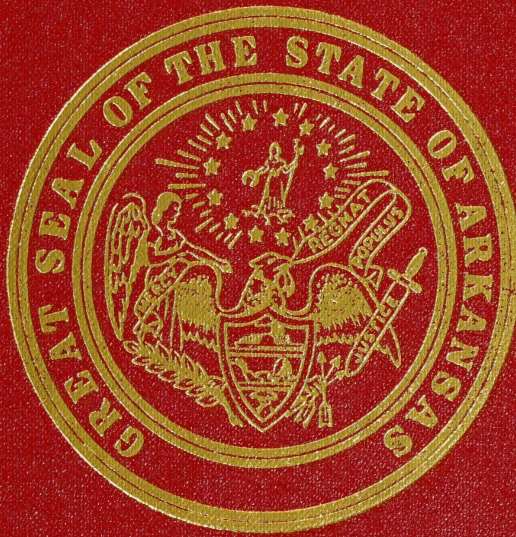



ARKANSAS CODE OF 1987 ANNOTATED

OFFICIAL EDITION



COMMENTARIES
VOLUME B (T. 5-28)



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ARKANSAS CODE OF 1987 ANNOTATED



COMMENTARIES

**1995 Replacement
Volume B**

Prepared by the Staff of the Arkansas Code Revision Commission

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ARKANSAS CODE
OF 1887
ANNOTATED



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Arkansas Code Revision Commission Preface

In preparing the Arkansas Code of 1987, the Arkansas Code Revision Commission has tried to determine which parts of the Arkansas Code of 1987 are derived from uniform acts, model acts, and other acts prepared by various organizations and adopted by the Arkansas General Assembly for which official commentaries were prepared. When available, the official commentaries to the various uniform, model, and other acts have been collected and notes inserted by the commission to explain the additions, deletions, and changes made in the texts of the acts as adopted in Arkansas. These commentaries and additional notes by the commission are published for the convenience of practitioners in Arkansas.

Every effort has been made to assure the accuracy of the commission-added notes to the commentaries; however, the commission-added notes are not official commentaries and should not be relied upon to the same extent as the official commentaries.

When the Arkansas General Assembly enacted the Arkansas Criminal Code of 1975, it considered the official commentary by the Criminal Code Revision Commission along with the text of the then-proposed Criminal Code. Since adoption of the Criminal Code in 1975, Frank Newell, one of the original drafters of the Arkansas Criminal Code, has prepared and published commentaries to the Criminal Code explaining changes made to the Criminal Code by the Arkansas General Assembly since its adoption and court decisions interpreting the Criminal Code. The commentaries by Frank Newell, although not official, have been included and may be helpful to practitioners in Arkansas.

Publisher's Preface

The two Commentaries volumes of the Arkansas Code of 1987 Annotated reprint commentaries to various uniform laws, model acts, etc., which are codified in the Code. Permission to reprint these commentaries was obtained by the Arkansas Code Revision Commission. The text of the commentaries was provided by the staff of the Arkansas Code Revision Commission; footnotes were also reviewed or added by the Commission.

Suggestions, comments, or questions about this or any other volume of the Code are welcome. You may call our toll-free number, 1-800-446-3410, fax us toll free at 1-800-643-1280, or write: Arkansas Code Editor, The Michie Company, P.O. Box 7587, Charlottesville, Virginia, 22906-7587.

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User's Guide

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

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TITLE 5

CRIMINAL OFFENSES

CRIMINAL CODE

(§ 5-1-101 ET SEQ.)

A.C.R.C. Notes. The original commentary to the Arkansas Criminal Code was drafted by Frank B. Newell and L. Scott Stafford, who were assisted by the persons named below with regard to the indicated chapters:

Martin Nevrla — Chapter 13

Alston Jennings, Jr. — Chapters 39, 73

Michael Gorman — Chapter 26

Professor Rafael Guzman of the University of Arkansas Law School at Fayetteville drafted the commentary to subchapter 3 of chapter 2.

The original commentary, which was distributed as a part of the proposed Official Draft of the Code to each member of the General Assembly, was drafted to explain the provisions of that draft. Consequently, its references to “present law” or “existing statutory authority” were, in innumerable instances, references to prior law. In 1977, the original commentary was revised by Frank B. Newell to eliminate these ambiguities. Minor changes were also made to reflect amendments to the

Code by the 1975 and 1977 legislative sessions. As the 1988 Supplementary Commentary was prepared, some Original Commentary was changed to make it clear that it refers to provisions that have been amended. Despite these changes, the Original Commentary herein is for the most part identical to the commentary to the Proposed Official Draft and the Code as originally published.

In 1983, supplementary commentary was prepared by Frank B. Newell and Associate Professor L. Scott Stafford. The conclusions stated in this commentary were those of the authors, and neither the Arkansas Criminal Code Revision Commission nor any other state agency reviewed or approved them.

In 1985, Mr. Newell prepared additional supplementary commentary, and his 1988 supplementary commentary combines the 1983, 1985, and new 1988 supplementary commentaries under the heading *1988 Supplementary Commentary*.

Original Commentary to Subtitle 1, Chapter 1

Table of Authorities

Below is a list of proposed state and federal codes which served as reference works in the drafting of the Arkansas Criminal Code and Commentary thereto. Where appropriate, the list indicates in brackets the abbreviated form by which references to these Codes are made in the Commentary.

Final Report of the National Commission on Reform of Federal Criminal Laws, United States Government Printing Office, Washington, D.C. (1971) [Proposed Federal Code].

Working Papers of the National Commission on Reform of Federal Criminal Laws, United States Government Print-

ing Office, Washington, D.C. (2 volumes) (1970) [Working Papers].

Proposed Kansas Criminal Code, Kansas Judicial Council Bulletin (Special Report) (State Printer, Topeka, Kansas: April, 1968) [Proposed Kansas Code].

Kentucky Penal Code Final Draft, Kentucky Crime Commission, Legislative Research Commission, Frankfort, Kentucky (1971) [Proposed Kentucky Code].

Proposed Criminal Code of Massachusetts, The Lawyers Co-operative Publishing Company, Rochester, N.Y.; The Michie Company, Charlottesville, Virginia (1972) [Proposed Massachusetts Code].

Michigan Revised Criminal Code, Spe-

cial Committee of the Michigan State Bar for the Revision of the Criminal Code and Committee on Criminal Jurisprudence State Bar of Michigan; West Publishing Co., St. Paul, Minn. (1967) [Proposed Michigan Code].

The Proposed Criminal Code for the State of Missouri, The Committee to Draft a Modern Criminal Code; West Publishing Co., St. Paul, Minn. (1973) [Proposed Missouri Code].

Model Penal Code, Reprint — Tentative Drafts Nos. 1, 2, 3, and 4, The American Law Institute, Philadelphia, Pa. (1953, 1954, 1955) [M.P.C.].

Model Penal Code, Reprint — Tentative Drafts Nos. 5, 6, and 7, The American Law Institute, Philadelphia, Pa. (1956, 1957) [M.P.C.].

Model Penal Code, Reprint — Tentative Drafts Nos. 8, 9, and 10, The American Law Institute, Philadelphia, Pa. (1958, 1959, 1960) [M.P.C.].

Model Penal Code, Reprint — Tentative Drafts Nos. 11, 12, and 13, Proposed Final Draft No. 1, The American Law Institute, Philadelphia, Pa. (1960, 1961) [M.P.C.].

Model Penal Code, Reprint — Proposed Official Draft, The American Law Institute, Philadelphia, Pa. (1962) [M.P.C.].

Report on Proposed New Hampshire Criminal Code, Commission to Recom-

mend Codification of Criminal Laws, Criminal Law Revision Commission, Manchester, N.H. (1969) [Proposed New Hampshire Code].

Proposed Oregon Criminal Code, Criminal Law Revision Commission, Salem, Oregon (1970) [Proposed Oregon Code].

S. 1, 93d Congress, 1st Session (1973).

S. 1, 94th Congress, 1st Session (1975).

S. 1400, 93d Congress, 1st Session (1973).

Texas Penal Code, A Proposed Revision, State Bar Committee on Revision of the Penal Code; West Publishing Co., St. Paul, Minnesota (1970) [Proposed Texas Code].

Proposed Criminal Code of Vermont, Joint Criminal Code Study Committee; Equity Publishing Corporation, Oxford, New Hampshire (1970) [Proposed Vermont Code].

Revised Washington Criminal Code, Judiciary Committee of the Washington Legislative Council, Olympia, Washington (1970) [Proposed Washington Code].

The Code was enacted in March of 1975. Section 41-101 [(Ark. Code Ann. § 5-1-101 (1987))] provided for an effective date far enough in the future to allow the law enforcement and legal communities to become thoroughly conversant with the Code before it went into effect.

Original Commentary to § 5-1-102

Most terms used in the Code are defined in the initial section of the chapter to which they apply. However, the use of some terms is so pervasive that this procedure was infeasible. These terms are defined here. In addition, the Chapter on Culpability explains the various culpable mental states. Since all offenses defined in the Code require the existence of one of these mental states, each has been cross-referenced to the appropriate section in the Chapter on Culpability.

Subsection (5) attempts to define "element of the offense," a rather elusive concept in spite of the fundamental role it has long played in the criminal law. The ingredients of a criminal offense consist of conduct, attendant circumstances, or a result of conduct, or some combination of the three. With respect to each, the offense will require a culpable mental state, whether it be a general mens rea or a more specific intent. The conduct, atten-

dant circumstances, or result, plus the mental state required with respect to each, constitute the elements of that offense. In addition, if the statute defining the offense, another section of the Code, or general decisional law provides an excuse or justification for the conduct, then the conduct, attendant circumstances, or result that negates the excuse of justification constitutes an element of the offense. By including in the definition of "element of the offense" an excuse or justification for conduct, the Code does not alter the traditional burden of proof with respect to a "defense." As expressly indicated in § 5-1-111(c), the state is not compelled to disprove a "defense" until evidence is admitted that supports the "defense." At that point, the state must negate the "defense" beyond a reasonable doubt just as it must prove other "elements of the offense." If an excuse or justification is denominated an "affirmative defense," the negation of the

excuse or justification is still an "element of the offense," but § 5-1-111(d) clearly places on the defendant the burden of proof with respect to the issue. Purely procedural considerations, such as commission of the offense within the period of limitations or the jurisdiction of the court, are not considered "elements of the offense."

It should be noted that the Commission has given such terms as "deadly weapon" and "public servant" functional definitions. This should be compared with the all too common technique whereby a term is defined by listing examples, an approach that taxes the draftsman's imagination and inevitably leads to oversights.

"Law enforcement officer" is also given a functional definition; formerly, the law defining "peace officers" and their authori-

ties and duties was scattered and fragmentary. See, e.g., §§ 43-204, 43-406 (Repl. 1964); § 26-210 (Repl. 1962); *Winkler v. State*, 32 Ark. 539 (1877); Amendment No. 35 to the Arkansas Constitution (Game Wardens) and *Anderson v. State*, 213 Ark. 871, 213 S.W.2d 615 (1948). See, also, *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d 529 (1942).

The distinction between "physical injury" and "serious physical injury" is used repeatedly in the Code to distinguish different grades or degrees of the same offense. The more aggravated harm occurs if the injury is almost fatal or results in more than a temporary impairment of physical condition.

The remaining terms defined in this section are self-explanatory and do not need further explication.

1988 Supplementary Commentary to § 5-1-102

The distinction between "physical injury" and "serious physical injury" is discussed in *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984). See also, *Lum v.*

State, 281 Ark. 495, 665 S.W.2d 265 (1984); *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976); *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977).

Original Commentary to § 5-1-103

This section establishes the substantive scope of the Code. In compliance with constitutional proscriptions on ex post facto laws, subsections (a) and (b) provide that the Code applies only to offenses committed after the effective date of the Code. See, U.S. Const. art. 1, § 10; Ark. Const. art. 2, § 17. Subsection (c) makes it clear that offenses committed before that date are to be prosecuted under prior law. Since many criminal statutes were repealed in conjunction with the enactment of the Code, subsection (e) preserves repealed statutes to the extent necessary to punish offenses committed prior to the effective date of repeal. Compare, Ark. Code Ann. § 1-2-120 (1987). As stated in subsection (b), the Code hereafter applies to all prosecutions for offenses defined by statutes outside the Code. Hence, the Code will govern a prosecution for viola-

tion of a statute enacted subsequent to the Code or not repealed by the Code.

The one exception to the rule of prospective application of the Code is found in subsection (d). In drafting a unitary body of criminal law the Commission was compelled to re-evaluate many of the defenses currently available to a defendant in a criminal prosecution. As a result, some common law defenses have been abolished or refined and several new defenses have been created. Because the Code embodies progressive judgments as to the nature and scope of defenses, the Commission wished to make Code defenses applicable to as many future prosecutions as possible. Therefore, subsection (d) gives a defendant charged with committing an offense prior to enactment of the Code the option of having his defenses governed by either the Code or by pre-existing law.

1988 Supplementary Commentary to § 5-1-103

Subsection (d) allows a defendant charged with an offense committed prior to the adoption of the Code to elect to have the construction and application of any defense governed by the Code. The option applies only to matters specifically designated a defense by the Code or which fall within the general definition of defense found in § 41-110(3) (§ 5-1-111(c)). For example, a defendant does not have the option to invoke the limitations period

prescribed in § 41-104 (§ 5-1-109) when the period is shorter than that prescribed by the law in effect at the time the offense was committed, *Patrick v. Lineberger*, 265 Ark. 334, 576 S.W.2d 191 (1979), nor is a defendant charged with a pre-Code offense entitled automatically to credit under § 41-904 (§ 5-4-404) for time spent in custody. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979).

Original Commentary to § 5-1-104

The purpose of this section is to determine the applicability of Arkansas criminal statutes to either conduct or results occurring outside the territorial boundaries of the state. The section is adapted from M.P.C. § 1.03. Like the "long arm" statute now used in civil actions, the provision is designed to extend the extra-territorial effect of Arkansas law to the maximum extent desirable and constitutionally permissible. The Commentary to the Model Penal Code indicates that the common law rules respecting territorial jurisdiction of a court were designed to ensure that an offense was not subject to prosecution in more than one jurisdiction. The increased mobility of contemporary criminals has greatly enhanced the possibility that particular conduct will affect more than one state. In order to adequately protect the various interests underlying a state's criminal laws, it was necessary to formulate a concept of territorial jurisdiction that acknowledged that the same criminal conduct might be prosecutable in several states. The possibility that this might lead to harassment of defendants is dealt with by giving double jeopardy effect to prosecutions in other jurisdictions.

Subsection (a)(1) will govern most cases in which an offense has a nexus with another state. Insofar as it applies to the person who causes a prohibited result in this state by engaging in conduct outside the state, the subsection restates traditional doctrine. See, *Cousins v. State*, 202 Ark. 500, 151 S.W.2d 658 (1941) quoting with approval from 22 C.J.S. at 219 as follows:

"If a crime covers only the conscious act

of the wrongdoer, regardless of its consequences, the crime takes place and is punishable only where he acts; but, if a crime is defined so as to include some of the consequences of an act, as well as the act itself, the crime is generally regarded as having been committed where the consequences occur, regardless of where the act took place, and under a statute so providing a person who commits an act outside the state which affects persons or property within the state, and which, if committed within the state, would be a crime, is punishable as if the act were committed within the state."

As contemplated by the introductory language to this section, this situation — i.e., conduct in another state causes a criminal result within this state — frequently arises when a person outside the state is charged with being an accessory or accomplice to an offense within this state. At one time, an accessory whose acts took place outside the state could not be punished for an offense occurring in Arkansas. *State v. Chapin*, 17 Ark. 561 (1856). However, the statutory abolition of distinctions between principals and accessories superseded the Chapin holding, so by permitting prosecution of the out-of-state accessory the Code breaks no new ground. See, *Mortensen v. State*, 214 Ark. 528, 217 S.W. 325 (1949). The converse situation — i.e., conduct within this state causes a criminal result in another state — has never been explicitly addressed by the Arkansas Supreme Court. In *State v. Chapin, supra*, the Court stated in dictum that the out-of-state accessory could be prosecuted in the other state for a result occurring in Arkansas. Abolishing the dis-

inction between principals and accessories would appear to allow prosecution of the out-of-state accessory in either Arkansas or the other state. However, in a somewhat analogous case involving whether venue lies in the county where the accessory's acts occur or in the county where the result occurs, the Court ruled that trial could be held only in the latter county. See, *State v. Reeves*, 246 Ark. 1187, 442 S.W.2d 229 (1969). Subsection (a)(1) clearly permits a prosecution in Arkansas for conduct causing a result in another state.

If the result that is the object of conduct occurring outside the state is not achieved, then subsection (a)(1) is not applicable since neither the conduct nor the result occurred in Arkansas. To cover the situation where an actor launches from outside the state an unsuccessful effort to cause a criminal result in Arkansas, subsection (a)(2) provides that an extra-territorial attempt to commit an offense in Arkansas is prosecutable in this state. An example of such a case is the person in Texas who mails a bomb to an Arkansas resident, but the package is intercepted prior to delivery. Subsection (a)(2) authorizes a prosecution in Arkansas for attempted murder.

Subsection (a)(3) is directed at the extra-territorial conspiratorial agreement whose objective is the commission of an offense in Arkansas. There is no Arkansas precedent for the assertion of extra-territorial jurisdiction in this situation, probably due to the absence of a workable conspiracy statute rather than the hesitancy of Arkansas judges to uphold jurisdiction over out-of-state conspirators. Unlike an extra-state attempt to commit an offense in Arkansas, the extra-state conspiracy is prosecutable in Arkansas only if an overt act in furtherance of the conspiracy occurs within the state. The additional requirement is justified "(s)ince conspiracy normally involves a less immediate threat than attempt and the conspiracy may be formed far from the place of the intended consummation of the crime...." *M.P.C. § 1.03, Comment at 12 (Tent. Draft No. 5, 1956)*.

Subsection (a)(4) is designed to prevent Arkansas from becoming a haven for persons engaged in violating the laws of other states. The ultimate object of the attempt, solicitation, or conspiracy must be an of-

fense both in this state and the jurisdiction in which it will culminate.

Subsection (a)(5) subjects a person to prosecution for omission to perform a legal duty imposed by Arkansas law, regardless of the person's location at the time of the omission. The provision would be applied most frequently in cases where a person failed to support his dependents in violation of § 41-2405 (§ 5-26-401). However, it is not so limited and could also be used to assert extra-territorial jurisdiction over an Arkansas resident who failed to pay state income tax. In the area of nonsupport, this subsection is broader than former law since it permits the prosecution of a person who has never entered the state when a dependent to whom he owes a duty of support resides within the state. Former law probably required that abandonment or desertion of the dependents occur within the state before the failure to support dependents could be prosecuted in Arkansas. See prior authority previously codified as Ark. Stat. Ann. § 41-204 (Supp. 1973), and *Dean v. State*, 173 Ark. 4, 291 S.W. 808 (1927) (interpreting a predecessor statute).

Subsection (a)(6) is an enabling statute that acknowledges the power of the legislature to expressly impose extra-territorial liability in a circumstance not directly covered by the five preceding paragraphs.

Subsection (b) establishes a separate rule applicable to the offense of homicide. The offense is singled out for special treatment because of its serious nature, the occasional difficulty of detecting where it occurred, and the fact that the act causing death and the death may occur at different geographical locations. See, *M.P.C. § 1.03, Comment at 9 (Tent. Draft No. 5, 1956)*. The provision permits a homicide prosecution in Arkansas if either the death or the contact causing the death occurs within the state. If the fatal blow is struck in Arkansas, the fact that death ensued in another jurisdiction should clearly not divest the Arkansas courts of jurisdiction, but asserting jurisdiction based solely on death in Arkansas is not so easily justified. The latter authority, however, should prove useful in cases where it is possible to determine where the victim died but not where the fatal contact occurred. If the location of fatal contact is known and the death in Arkansas is a completely fortuitous circumstance, as

where a person wounded in Oklahoma dies in an Arkansas hospital, it is anticipated that the appropriate Arkansas pros-

ecuting authority will defer to the proceedings in the other state.

1988 Supplementary Commentary to § 5-1-104

The Supreme Court added judicial gloss to this section in *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979). The victim of a rape testified that the rape had taken place in the backseat of an automobile at some point during a drive from Arkansas through Oklahoma and Texas. The defense argued that the prosecution had failed to prove beyond a reasonable doubt that all elements of the offense had occurred in Arkansas. Without specifically citing § 41-103 (§ 5-1-104), the Supreme Court held that “if the requisite elements of the crime are committed in different jurisdictions, any state in which an essen-

tial part of the crime is committed may take jurisdiction.” Since the essential element of the offense of rape is the actual penetration of the victim and there was testimony from the driver of the vehicle to the effect that penetration occurred in Arkansas, the Court sustained the trial court’s finding on the jurisdictional question.

Gardner v. State, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979) has been followed by *Glisson v. State*, 286 Ark. 329, 692 S.W.2d 227 (1985). See, also, Ark. Code Ann. § 5-1-111 (a)-(b) (1987) (when State required to prove jurisdiction or venue).

Original Commentary to § 5-1-105

Subsection (a) defines “offense,” a term of obvious importance to a criminal code. Under prior law, an offense was “any act or omission for which the law . . . prescribed a punishment.” See prior law formerly codified as Ark. Stat. Ann. § 41-101 (Repl. 1964). As defined in the Code, “conduct” means “act or omission.” See, § 5-2-201(3). Therefore, the only significant difference in the definitions is that a “statute” rather than the “law” must authorize imposition of punishment for the particular conduct. This results in a rather fundamental change since restricting the definition of offenses to those defined by statute means that common law offenses are abolished. Former authority previously found at Ark. Stat. Ann. § 41-

107 (Repl. 1964), authorizing a court of competent jurisdiction “to punish the offender under the provisions of the common or statute law of England,” has been repealed.

Subsection (2) divides offenses into three classes. Old law provided for only two — felonies and misdemeanors. See prior law earlier codified as Ark. Stat. Ann. § 41-102 (Repl. 1964). All three classes — including the new category “violation” are defined and explained in the three succeeding sections.

Subsection (3) ensures that, even in the absence of explicit statutory authority, courts retain the power to impose punishment for criminal or civil contempt.

1988 Supplementary Commentary to § 5-1-105

Creation of New Common Law Crimes

In *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987), appellant was convicted of manslaughter for killing an unborn viable fetus in an automobile accident. He appealed, contending that the applicable statute, § 5-10-104 (a) (3), providing for liability where one “recklessly causes the death of another person,” was inapplicable, a fetus not being a “person.”

“Person” is not defined by the Code. The

Court therefore looked to the common law and found that an unborn fetus was not included within the definition of a person. *Meadows* at 107-08, 722 S.W.2d at 585. It then said, “The critical issue is whether a court ought to create a new common law crime.” *Id.* at 108, 722 S.W.2d at 585. It decided the question in the negative, citing fundamental policy reasons. *Id.* at 109, 722 S.W.2d at 586.

Ark. Code Ann. § 5-1-105 (a), not men-

tioned by the Court, also provides an answer to the question. Subsection (a) states, "An offense is conduct for which a sentence to a term of imprisonment or fine

or both is authorized *by statute*." Therefore, the Court would appear limited by subsection (a) to enforcement of statutes.

Original Commentary to § 5-1-106

Section 5-1-106 defines and classifies felonies.

Under subsection (a) all felonies will be so designated in the statute defining the offense. Under prior law "[a] felony [was] an offense of which the punishment [was] death or confinement in the penitentiary." See former authority previously codified as Ark. Stat. Ann. § 41-103 (Repl. 1964). The Arkansas Supreme Court construed this to mean that an offense was a felony only if the penal provision provided for "imprisonment in the penitentiary." Hereafter, a criminal statute need only indicate that conduct in contravention of the statute constitutes a "felony"; invocation of the magic words "imprisonment in the penitentiary" is no longer necessary. Hopefully, this change will eliminate legislative oversights leading to results such as that in *Bennett v. State*, 252 Ark. 128, 477 S.W.2d 497 (1972), which held that an offense punishable by fifteen years imprisonment was a misdemeanor since the words "in the penitentiary" were absent from the penal provision.

Subsection (b) subdivides felonies into four classes. In so doing, the Code adopts the approach recommended by the Model Penal Code and the American Bar Association Project on Minimum Standards for Criminal Justice. See, M.P.C. § 6.01; A.B.A. Standards, Sentencing Alternatives and Procedures, Standard 2.1 (1968). The primary reason for classifying offenses is to provide a basis for imposing sentence. This represents a significant departure from the traditional legislative technique of prescribing a penalty in the statute defining the offense. Earlier statutes contained penal provisions adopted at different times by different legislatures, often without considering the penalties for related offenses. The practice of setting a different penalty for each offense resulted many times in comparable criminal conduct being punished quite differently. By limiting the punishment for commission of a felony to four possible ranges, while contemporaneously reviewing exist-

ing punishment provisions, the Code has hopefully created a simpler, fairer, and more consistent body of criminal law. It should be noted that classification is useful not only for purposes of imposing punishment; it also provides a basis for setting limitations periods and for grading inchoate offenses and offenses relating to obstruction of justice.

Subsection (c) states a rule of construction applicable to all felonies not repealed by the Code. No attempt has been made to bring all such unrepealed felonies into the Code quadripartite classification. A general section in the Code that classifies all felonies outside the Code on the basis of penalties presently provided raises constitutional problems under art. 5, § 23 of the Arkansas Constitution, which requires that the amended statute and amendatory language be "published at length." The alternative of amending each unrepealed felony statute by substituting a Code classification for the present penalty clause was also rejected. This would not only have substantially increased the size of the Code legislative package; it might have also led to delays since, except in a few instances, each classification decision would necessarily require a choice between raising or lowering the penalty for a particular offense. The approach of subsection (c) to the problem of unrepealed felonies is, assuming they contain a penal provision, to denominate them "unclassified felonies." Pursuant to §§ 5-4-401(a)(5) and 5-4-201(a)(3), such felonies will continue to carry the same imprisonment or fine as under prior law. The first sentence of § 5-1-106(c) applies in the unlikely event that an offense designated a felony by a statute outside the Code does not prescribe a penalty.

It is anticipated that in the future a criminal statute defining a felony will specify an appropriate class. However, since future legislatures cannot be compelled to comply with the Code classification scheme, subsection (c) is also needed as a precaution against the statute that

designates an offense a felony but fails to classify the felony. The first sentence applies if the statute merely states that violation is a felony without specifying the class or providing a maximum term of imprisonment. Such crimes will be deemed class D felonies, the least serious category of felony. The second sentence

applies if a future statute sets its own limitations on a sentence to imprisonment. If this occurs, then the felony is an unclassified felony, and, as explained above, the statutory limitation rather than the Code limitation will determine the maximum possible imprisonment or fine.

1988 Supplementary Commentary to § 5-1-106

Class Y Felonies

Act 620 of 1981 created a new class of felony — Class Y — in order to enhance the punishment for what the General Assembly perceived to be the most serious Class A felonies. These changes and their effect on the disposition of offenders are discussed in the supplementary commentary to §§ 5-4-104 and 5-4-401.

Reclassification of rape as a class Y felony was held in *Young v. State*, 14 Ark.

App. 122, 685 S.W.2d 823 (1985) to be a substantive change. A defendant charged with an offense after the effective date of the reclassification amendment must be tried under substantive law in effect when the offense was committed. Though the court made no broad finding applicable to past and future reclassifications, the assumption that *Young* will govern is obviously advisable. See also *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

Original Commentary to § 5-1-107

This section, which defines and classifies misdemeanors, follows the same basic pattern as the preceding one. Under the Code, an offense punishable by imprisonment is either a felony or a misdemeanor. If the statute defining an offense provides that the offense is punishable by imprisonment but fails to indicate whether the offense is a felony or a misdemeanor, subsection (a)(3) makes it clear that the offense is a misdemeanor. The exception to (a)(2) means that an offense designated a misdemeanor by statute will not be a misdemeanor for purposes of the Code unless the offense is punishable by imprisonment. The effect of §§ 5-1-107(a)(2) and 5-1-108(b) is to transform all offenses punishable by fine only into a new category of offense called "violation."

Subsection (b) subdivides misdemeanors into three classes. There is little reason to draw fine distinctions between misdemeanors since the class as a whole subsumes roughly comparable conduct punishable, at the most, by a year's imprisonment. Therefore, the argument for a limited choice of penalty ranges, as discussed in the *Commentary* to § 5-1-106, is equally, if not more, compelling with respect to misdemeanors.

Subsection (c) parallels the language of subsection (c) of § 5-1-106. The first sen-

tence applies if the statute merely states that the offense is a misdemeanor. The statute might be enacted after the Code but it is far more likely to be one enacted before the passage of the Code. In either case, the offense defined by the statute is a class A misdemeanor. If the statute states that the offense is a misdemeanor but also prescribes a limit on potential imprisonment, then the second sentence of subsection (c) makes the offense an unclassified misdemeanor.

Section 5-1-107 has the following effect on existing and future offenses. If the offense is designated a misdemeanor but the defining statute contains no penal provision, then the offense is a class A misdemeanor punishable pursuant to §§ 5-4-401(b)(1) and 5-4-201(b)(1) by a maximum sentence of a year's incarceration and a \$1,000 fine. Previous law was virtually identical. See earlier authority formerly codified as Ark. Stat. Ann. § 41-106 (Supp. 1973) (360 days and \$100 fine). If the offense is not designated a felony and the statute defining it prescribes limitations on a sentence to imprisonment, then the offense is an unclassified misdemeanor for purposes of the Code, and the limitations on imprisonment and fine in the defining statute govern the imposition of sentence. If an offense is punishable by

a fine only, then regardless of any designation as a misdemeanor in the defining statute, the offense is a violation for purposes of the Code, including imposition of sentence. The court could sentence the

offender convicted of such an offense to pay a fine not exceeding the limit set by the defining statute, but in no event would a sentence to imprisonment be authorized.

1988 Supplementary Commentary to § 5-1-107

There have been no significant developments regarding this section since the enactment of the Code.

Original Commentary to § 5-1-108

This section defines violations — a new category consisting of offenses punishable by fine only. All violations defined by the Code are so designated. It is contemplated that when a future legislature determines that an offense does not warrant imposition of imprisonment, it will expressly designate the offense a “violation.” Subsection (b) is primarily directed at the many misdemeanor statutes that are currently punishable by fine only. The limita-

tions on fines imposed by such statutes will still govern for purposes of punishment, but for all other purposes of the Code, the offenses will be violations. Subsection (b) also applies to offenses enacted in the future. Regardless of any designation of the offense as a felony or misdemeanor, if the statute defining the offenses indicates a legislative intent that it be punishable by fine only, the offense is a violation for purposes of the Code.

1988 Supplementary Commentary to § 5-1-108

There have been no significant developments regarding this section since the enactment of the Code.

Original Commentary to § 5-1-109

This section refines and, to a minor degree, modifies prior law respecting the statute of limitations on criminal prosecutions. Former law provided for an indefinite limitations period with respect to offenses punishable by death, a three year limitations period with respect to all other felonies, and a one year period for misdemeanors. See previous authority found at Ark. Stat. Ann. §§ 43-1601-1603 (Repl. 1964). Since Act 438 of 1973 limited capital offenses to specific types of aggravated murder, it appears that, until the Code's effective date, offenses formerly punishable by death, such as rape and first degree murder, were subject to the three year limitations period then applicable to felonies in general. Subsection (a) is broader than former law to the extent that it permits a prosecution for any type of murder to be commenced at any time. Subsection (b) also restores some of the original scope of § 43-1601 by enlarging

the limitations period from three to six years in the case of class A felonies.

Under § 41-112 (§ 5-1-106) all felonies are divided into four classes. Class A is reserved for the gravest of offenses and includes such crimes as rape and aggravated robbery. The three remaining classes of felonies carry the same three year limitations period as prior law. Misdemeanors and violations must be prosecuted within one year of commission, again paralleling old law.

Subsection (c) extends the limitations period otherwise applicable in two special cases. If the offense involves either fraud or breach of a fiduciary obligation, a prosecution may be commenced within a year of the date it is discovered or should be discovered by appropriate parties. Previous statutory authority postponed the running of the limitation period only in cases of embezzlement and applied different rules depending on who committed the

embezzlement. The limitations period as to embezzlement by an administrator, guardian, or curator was tolled until an accounting disclosed the defalcation. An actual discovery of the theft prior to an accounting apparently did not start the running of the period. See former law at Ark. Stat. Ann. § 43-1602 (Repl. 1964). In all other cases of embezzlement of "trust funds," § 43-1602 tolled the limitations period until actual discovery. By postponing the entire limitations period, § 43-1602 allowed a prosecution to be commenced within three years of either an accounting or discovery, whereas subsection (c) extends the period by only a year.

The other special limitations rule applies to felonious official misconduct by a public servant. The rationale underlying a separate statute of limitations for offenses committed by public servants is the necessity of offsetting the opportunity to conceal misconduct or to exert official pressure to discourage prosecutions. Accordingly, the Code establishes a special five year limitations period that begins to run upon the person's leaving public employment or discovery of the offense, whichever is sooner. The longer period was deemed appropriate since a full accounting is not always accomplished within three years after the person leaves office. If the offense was discovered prior to the person's leaving public employment, the limitations period begins to run then. Since the potentiality for abuse of official power exists so long as the person remains in public service, and in fact may be enhanced by his elevation or election to a higher post, subsection (c)(2) provides that the limitations period does not begin to run so long as the person continuously occupies any public office or position, unless, of course, the offense is discovered sooner. It was the Commission's intention that a hiatus in the person's status as a public servant would commence the running of the limitations period. Since the rationales supporting a limitations period demand that at some point prosecutions be unconditionally foreclosed, the final clause of subsection (c)(2) provides that prosecution of a public servant is barred in any event if ten years elapse after commission of the offense.

In sum, subsection (c)(2) effected several changes to old law, which treated offenses by a public servant under the

general rubric of embezzlement by an administrator, guardian, or curator. See, *Scott v. State*, 181 Ark. 1138, 39 S.W. 2d 667 (1930). The Code subsection is broader since it applies to any felonious conduct while the previous statute was limited to the offense of embezzlement. As explained above, the subsection also extends the limitations period from three to five years. Under former law, the period began to run when the person left office, on the theory that his duty to account to his successor arose at that time. The same rule, with the refinements discussed above, is adopted by the subsection.

Subsection (d) is taken from *Proposed Federal Criminal Code § 701 (Final Report of the National Commission on Reform of Federal Criminal Laws (1971), hereafter cited Proposed Federal Criminal Code)*. It avoids a dilemma that frequently arose under old law. When, for example, a person was prosecuted for murder more than three years after the alleged homicide, the jury either had to convict of murder or acquit since the statute of limitations had run on the included offense of manslaughter. Presenting the jury with such a choice tended to distort the guilt determination process and may have operated to the prejudice of either the state or defendant, depending on the circumstances of the case. The new section's requirement that there be sufficient evidence to sustain a conviction of the higher offense should prevent a prosecutor from filing wholly frivolous charges and then proceeding to prove the commission of a lesser included offense on which the limitations period has run.

Crucial to the application of a criminal statute of limitations is the determination of when the offense is committed and when the prosecution is commenced. Subsections (e) and (f) answer these questions. The substance of subsection (e) is that the limitations period begins to run when the defendant could first be prosecuted for the offense. The subsection also states a special rule applicable to statutes prohibiting a continuing course of conduct. For example, if possession of an object is declared illegal, the elements of the offense are present from the moment defendant takes possession, but the limitations period does not begin to run until his possession ends. Another special rule, applicable to prosecutions for conspiracy

to commit an offense, is found in § 41-711 (§ 5-3-406).

Under prior law a prosecution was commenced when an indictment was found or an information or other charging instrument filed. Subsection (f) changes this by running the initiation of a prosecution from the issuance of an arrest warrant. This prevents a prosecutor from securing an indictment or filing an information and then delaying the issuance of a warrant while gathering additional evidence. The new rule should not substantially affect the procedures of most prosecuting attorneys since warrants are issued immediately upon the return of an indictment or filing of an information in the vast majority of cases. The parallel problem of the law enforcement officer who delays serving a warrant is dealt with by requiring that a reasonable effort be made to serve the warrant if its issuance is to be deemed commencement of a prosecution. The term "other charging instrument" is intended to encompass affidavit complaints, citations, summons, and similar instruments which are presently or may hereafter be employed in non-felony prosecutions.

Subsection (g)(1) continues the previous practice of tolling the statute of limitations during any period when defendant flees the state or conceals his whereabouts within the state. See previous law codified as Ark. Stat. Ann. § 43-1604 (Repl. 1964). By using the phrase "continually absent" the Commission intended to connote a prolonged or sustained, but not an uninterrupted, absence. Thus the person who leaves the state for a lengthy period of time but returns periodically to visit relatives, is nonetheless "continually absent" for the entire period. On the other hand, a person who leaves the state for a short vacation is not "continually absent" and the statute is not tolled even for the limited period he is actually absent.

Subsection (g)(2) serves the same function as old Ark. Stat. Ann. § 43-1605 (Repl. 1964). It permits a prosecutor to file a different or an additional charge, notwithstanding the running of the limitations period, whenever a prosecution on a related charge was commenced within the limitations period.

1988 Supplementary Commentary to § 5-1-109

Delay in Charging

The Supreme Court has made it clear that the limitations periods prescribed by this section do not give the prosecution complete discretion to postpone charging a defendant. In *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978), the defendant was brought in for questioning in connection with a murder soon after it occurred but was released due to insufficient evidence. Shortly thereafter, he was convicted of a different offense and sentenced to prison. Some three years later, after a new prosecuting attorney had been elected, the defendant was charged with the murder. The defense filed a motion to dismiss, arguing that the delay had prejudiced the defendant since it precluded him from calling two alibi witnesses who were now unavailable. The State stipulated to the testimony of the alleged alibi witnesses, but it offered no explanation for the delay in bringing charges. The Court rejected the contention that a charge of murder can be filed at any time, stating that: "Since Scott was able to show prejudice to his defense, unless the State

can come forward with a satisfactory reason for the delay, the charges should be dismissed." 263 Ark. at 674, 566 S.W.2d at 740. The Court remanded to give the State an opportunity to make such a showing. Three dissenting justices would have dismissed outright on the grounds that the State had already had an opportunity to explain the delay and failed to take advantage of it.

In *Bliss and Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984), the Court found that a four year delay in filing rape charges did not prejudice the defendants in spite of the fact that several potential witnesses were dead or otherwise unavailable. The Court seemed to narrow somewhat its holding in *Scott* when it characterized *Scott* as standing for the proposition that: "(T)he prosecution cannot delay filing of charges in order to gain a tactical advantage over the accused." *Id.* at p. 320, 669 S.W.2d at 939.

Subsection (f) changed pre-Code law by providing that a prosecution commenced with the issuance of an arrest warrant rather than the filing of criminal charges.

In *Webb v. State*, 269 Ark. 415, 601 S.W.2d 848 (1980), the defendant objected to the admission into evidence of drugs seized from him following his arrest on an outstanding traffic warrant. The Court held that (1) a warrant which had not been issued as provided by law did not commence the prosecution for the traffic offense, and that (2) two years was an unreasonable period of time to delay the execution of the warrant even assuming that it was properly issued. The precise issue before the court was the legality of the defendant's arrest, but the ruling has implications for cases involving the statute of limitations.

In *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985) the defendant was charged and convicted in 1982 with a rape occurring in 1979, the delay being attributable to the victim's refusal to identify her attacker because of death threats. The court analyzed the relationship between the statute of limitations and due process considerations as follows:

In *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) the Supreme Court of the United States recognized that a statute of limitation defines only the outer limits of prosecution beyond which there would be an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced, but that within these limits the due process clause still has a limited role to play in protecting

against oppressive delay with prejudices the defendant's rights. These two decisions make it clear that where an indictment is returned within the period of limitations due process considerations do not arise until prejudice to the defense resulting from delay is alleged and demonstrated and it appears that the government intentionally delayed the indictment to gain some technical advantage over the appellee.

Id. at 125, 685 S.W.2d 825. See also *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978); *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984).

Young v. State has been followed in *Forgy v. State*, 16 Ark. App. 76, 697 S.W.2d 126 (1985) and *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

This section was amended by identical acts — Acts 484 and 586 of 1987 — that added subsection (h). The effect of the amendment is to extend the statute of limitations for a serious felony such as rape up to six years beyond the 18th birthday of the victim, regardless of the age of the victim at the time of the offense. A 10 year old rape victim could in theory wait until the day before his 24th birthday to obtain an arrest warrant. It should be noted that subsection (h) does not extend the statute of limitations in cases where the offense is reported to the police but no prosecution takes place — for instance as a result of victim's reluctance to testify against a parent.

Original Commentary to § 5-1-110

This and the three succeeding sections embody variations of the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution and article 2, section 8 of the Arkansas Constitution. Double jeopardy problems inevitably arise when the same criminal conduct constitutes a violation of more than one statute or constitutes multiple violations of the same statute. This section retains the basic power of the state to prosecute for as many offenses as are committed by defendant. Whether all such prosecutions may be joined for trial will be determined by procedural rules as to joinder. In this respect, § 5-1-110 is congruent with the joinder provisions of the Arkansas Rules of Criminal Procedure,

since Rule 21.1 thereof permits joining in a single indictment or information all offenses based on the same conduct. Section 5-1-110(a), however, prohibits multiple convictions under the five circumstances enumerated therein.

The substantive scope of the section will turn in part on the meaning of "same conduct," a term used here as well as in §§ 5-1-109(g)(2) and 5-1-113(1)(B). The term is intended to connote the same criminal transaction. It is broader than the same criminal act but not so broad as to encompass, in all cases, series of criminal acts pursuant to a single scheme or plan. If X comes upon A, B, and C and robs them one at a time, the robberies arise from the "same conduct" despite the fact

that X engages in separate acts with respect to A, B, and C. However, "same conduct" does not have application to a situation where X, pursuant to a single scheme, robs A on Monday, B on Tuesday, and C on Wednesday. It is impossible to draft a precise definition of "same conduct" that will work in all cases. The definitive limits of the term must, of necessity, be resolved on a case by case basis.

Subsection (a)(1) precludes conviction of both an offense and an included offense based on the same conduct. This probably restates old law. The lack of judicial precedent is likely due to the unquestioned soundness of the proposition.

Subsection (a)(2) prohibits convictions for both conspiracy, solicitation, or attempt and the offense that was the object of the conspiracy, solicitation, or attempt. Technically, this subsection does not merge the inchoate offense into the ultimate offense. Hence, a defendant can be prosecuted under the Code for conspiracy, notwithstanding that the offense that was the object of the conspiracy was actually consummated. This changes the holding of *Elsev v. State*, 47 Ark. 572, 2 S.W. 337 (1886), that a conspiracy indictment must allege and the state must prove that the offense that was the object of the conspiracy was not committed. Heretofore, this unreasonable procedural burden probably discouraged conspiracy prosecutions in Arkansas. The subsection prevents the evil at which the common law merger doctrine was directed without imposing an onerous proof requirement on the state. With respect to attempt, the subsection does not change prior law. For example, it was quite common to submit the offenses of rape and assault with intent to rape to a jury with instructions that they can convict of either offense, depending on whether they find the rape was actually consummated.

Use of the word "only" in subsection (a)(2) accomplishes two purposes. First, it makes it clear that the provision applies only to forms of preparation that are criminal solely because of their ultimate object. If the actor engages in conduct that is an offense without regard to its ultimate object, he may be convicted of both that offense and the offense that is his ultimate object. An example is the person who steals a firearm to use in a robbery. The second consequence of using the word

"only" is to restrict application of the subsection in the conspiracy context to the situation where the consummated offense was the sole object of the conspiracy. If the defendant conspired to commit a continuing series of offenses, he may be convicted of both the conspiracy and a completed offense committed pursuant to the conspiracy. For example, the person who agrees with others to engage in the continuing sale and distribution of drugs may be convicted of both conspiracy and a completed drug sale.

Subsection (a)(3) prohibits two convictions based on contradictory factual determinations. It would prevent a conviction for theft of property and for receiving the same stolen property since the gist of the first offense is that [the] defendant acquired the property by taking it whereas the second offense contemplates an acquisition of property already stolen by one other than the defendant. See, *Shue v. State*, 177 Ark. 605, 7 S.W. 2d 315 (1928).

Subsection (a)(4) prohibits conviction under both a general and a specific statute. For example, the person who employs physical force against a law enforcement officer attempting to carry out his official duties commits obstructing governmental operations (§ 5-54-102) and interference with a law enforcement officer (§ 5-54-104). Since the latter offense is a more particular type of obstructive conduct, the person cannot be convicted of both offenses.

Subsection (a)(5) prohibits multiple convictions for an uninterrupted course of conduct that violates a statute defining a continuing offense. It would find application in prosecutions for such offenses as nonsupport (§ 5-26-401) or promoting prostitution (§§ 5-70-104 to -106). The proviso at the end of paragraph (a)(5) leaves the legislature free to indicate, for example, that each day that illegal conduct continues constitutes a separate offense. See, e.g., prior law formerly codified as Ark. Stat. Ann. § 41-2103 (Repl. 1964) (Gate across public road).

By defining an included offense, subsection (b) serves two functions. Its primary purpose is to authorize conviction of offenses not expressly named in the indictment or information, cf., Ark. Stat. Ann. § 43-2149 (Repl. 1964), but it also delineates the exact scope of subsection (a)(1)'s prohibition on multiple convictions. Appli-

cation in either context turns on the meaning of included offense, which the Code defines by establishing three alternative tests.

The first repeats the traditional rubric: "To be an included offense, all the elements of the lesser offense must be contained in the greater offense — the greater containing certain elements not contained in the lesser." *Gaskin v. State*, 244 Ark. 541, 543, 426 S.W.2d 407, 409 (1968), quoting *Beck v. State*, 238 Ind. 210, 149 N.E. 2d 695 (1958).

The second type of included offense is an attempt to commit the offense charged. This also restates pre-existing law, Ark. Stat. Ann. § 43-2150(6) (Repl. 1964), although heretofore the absence of a general attempt statute in Arkansas has greatly restricted the application of the statute. An analogous situation was present with respect to a felony and an assault with intent to commit that felony. The Supreme Court consistently ruled in such cases that the assault was an included offense of the felony that was its object. See, *McBride v. State*, 7 Ark. 374 (1847); see, also, *Davis v. State*, 45 Ark. 464 (1885) (assault with intent to kill is included in offense of murder); *Harrison v. State*, 222 Ark. 773, 262 S.W.2d 907 (1953) (assault with intent to rape is included in offense of rape).

The third test for an included offense

takes into account two techniques employed by the Code to differentiate offenses of the same generic class. The grading of offenses is often based on the degree of injury or risk of injury to person or property. For example, battery in the first degree, § 5-13-201, occurs when the defendant purposely causes serious physical injury to another with a deadly weapon. Battery in the second degree consists of purposely causing physical injury to another. Applying subsection (b)(3) in combination with (b)(1) indicates that the latter offense is an included offense of the former, under the circumstances described. The included offense test of subsection (b)(3) is also satisfied if a lesser degree of culpability, or mens rea, suffices to establish the included offense. Hence, under most circumstances, manslaughter is an included offense of murder in either degree, since recklessly causing a death is necessarily subsumed into purposely causing a death. See, *Allison v. State*, 74 Ark. 444, 86 S.W. 409 (1904).

The final subsection authorizes a court to refuse to instruct on an included offense when the evidence mandates either conviction of the greater offense or acquittal. The Supreme Court has previously reached the same conclusion. See, *Caton and Headly v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972).

1988 Supplementary Commentary to § 5-1-110

Conviction of Multiple Offenses Arising out of Same Conduct — Subsection (a) (1) of § 5-1-110—Lesser Included Offense

Section 5-1-110 prohibits, in certain situations, multiple convictions when the "same conduct" establishes the commission of more than one offense. The situation that has generated the most cases is that described in subsection (a) (1). A defendant may not be convicted of more than one offense arising out of the same conduct when one of the offenses is included in the other.

Felony Murder and Underlying Felony

Subsection (a) (1) has frequently been invoked by defendants charged with murder and a separate felony based on the same conduct. A person who causes the death of another in the course or further-

ance of a felony commits murder in the first degree. § 5-10-102(a) (1). If the felony involved is rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, then the perpetrator is guilty of capital murder. § 5-10-101(a) (1). It is clear that a defendant cannot be convicted of murder under either of these sections and of the underlying felony on which the murder conviction is based. The offense of murder under either section includes the offense of the underlying felony since the underlying felony is established by "proof of the same or less than all the elements required to establish the commission" of the murder. See subsection (b) (1) defining "included offense." *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1983) (first degree murder and aggravated robbery); *Martin v. State*, 277 Ark. 175, 639 S.W.2d 738 (1982) (cap-

ital murder and kidnapping); *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981) (capital murder and aggravated robbery); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), *cert. denied*, 456 U.S. 938 (1982) (capital murder and aggravated robbery); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981) (capital murder and aggravated robbery). If the principal offense charged is attempted capital murder or attempted murder in the first degree, the result is the same. *Walton v. State*, 279 Ark. 193, 650 S.W.2d 231 (1983) (attempted capital murder and rape); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983) (attempted capital murder and robbery and kidnapping); *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982) (attempted capital murder and aggravated robbery); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981) (attempted capital murder and aggravated robbery).

In a case decided before those cited above, *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), *cert. denied*, 450 U.S. 1043 (1982), a defendant argued that he could not be convicted of both attempted capital murder and aggravated robbery based on the same conduct because his conduct constituted a continuing course of conduct for which multiple convictions were prohibited by subsection (1) (e) of § 41-105 (§ 5-1-110(a) (5)). Since subsection (a) (5) applies only to "an offense" defined as a continuing course of conduct, and neither capital murder nor aggravated robbery is defined as a continuing course of conduct, the Court properly rejected the argument. If the same argument had been made under subsection (a) (1), the defendant would have been successful, and, in fact, Rowe was successful in a subsequent appeal in which he relied on subsection (a) (1) rather than (a) (5). *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982).

Aggravated Robbery and Battery in the First Degree

A second line of cases decided under the "lesser included" rubric involves defendants charged with first degree battery (§ 5-13-201) and aggravated robbery (§ 5-12-103) based on the same conduct. Here, the Court has drawn a distinction based on the precise subsection of § 5-13-201 under which the defendant is charged. If the defendant is charged under

§ 5-13-201(a) (4) with causing serious physical injury to another under circumstances manifesting extreme indifference to the value of human life and in the course of or in furtherance of a felony, then he cannot be convicted of both first degree battery and the underlying felony. *Robinson v. State*, 279 Ark. 61, 648 S.W.2d 446 (1983); *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983); *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983). On the other hand, if the defendant is charged under § 5-13-201(a) (3), which requires only a showing that he caused serious physical injury to another under circumstances manifesting extreme indifference to the value of human life, then he may be convicted of both aggravated robbery and first degree battery based on the same conduct. *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983). The Court's decision in *Thomas* is technically correct since the elements of the two offenses are different. Each of the offenses requires proof of a fact which is not required by the other.

The distinction drawn by the Court in *Thomas* is confused somewhat by its earlier decision in *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982). Foster contended that his convictions for aggravated robbery, first degree battery, and second degree battery based on the same conduct violated the constitutional provision against double jeopardy. The Court refused to consider the argument with respect to the second degree battery conviction since it had not been raised below. The Court then considered whether first degree battery was established by proof of the same or less than all the elements required to establish aggravated robbery. It found in the negative since aggravated robbery can be committed merely by committing robbery while armed with a deadly weapon while first degree battery requires the additional element of infliction of serious injury. *Foster* may be explained by the fact that the defense argued double jeopardy rather than the statutory prohibition of § 5-1-110. This seems to be the explanation offered by the Court itself when discussing *Foster* in *Akins v. State*, *supra*. See 278 Ark. at 183, 644 S.W.2d at 275. A second possible explanation of *Foster* is that the defendant was charged with first degree battery under a subsection of § 5-12-201 other than subsection (a) (4). See, for example, sub-

sections (1) and (2) of § 5-12-201. The opinion does not indicate the subsection of § 5-12-201 involved, but by framing the issue as whether first degree battery is a lesser included offense of aggravated robbery, the opinion suggests that Foster was not charged under § 5-12-201(a) (4). If Foster was charged under subsection (a) (1) or (a) (3) then the result is consistent with *Thomas v. State, supra*. A final explanation for *Foster* is that each case must be examined on its own facts to determine whether the aggravated robbery charged is a lesser included offense of the first degree battery charged. Some support for this explanation is provided by *Akins v. State, supra*, where the Court actually examined the facts of the case and the charging document to confirm that aggravated robbery was actually included in the offense of first degree battery.

The defendant in *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977), made the same mistake as the defendant in *Rowe v. State*, discussed *supra*. Instead of arguing that convictions for aggravated robbery and first degree battery based on the same conduct were prohibited by subsection (a) (1), he argued that his conduct constituted an offense defined as a continuing course of conduct within the meaning of § 5-1-110(a)(5). As in *Rowe*, the Court found subsection (a) (5) to be inapplicable.

Aggravated Robbery and Possession of Firearm by a Felon

Aggravated robbery requires proof that the defendant was armed with a deadly weapon or represented that he was so armed. Section 5-73-103 makes it illegal for a convicted felon to own or possess a firearm. Since the latter offense requires proof of an element not required by the former (i.e., the fact that the defendant was a convicted felon), it is not a lesser included offense of aggravated robbery. Consequently, a convicted felon who uses a firearm to commit a robbery may be convicted of both offenses. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983).

Robbery and Theft

Robbery, as defined in § 5-12-102, and aggravated robbery, as defined in § 5-12-103, require only an intention to commit a theft. Theft of property, as defined in § 5-36-103, requires an actual "taking" of property. Theft of property is not a lesser

included offense of robbery since it requires proof of an actual taking and not just an intent to take. It is therefore possible for a person who actually takes property and who employs or threatens to employ physical force in the process to be convicted of both theft of property and robbery. *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980).

Kidnapping and Rape

Restraining another person so as to substantially interfere with his liberty for the purpose of engaging in sexual intercourse, deviate sexual activity, or sexual contact constitutes kidnapping, as defined in § 5-11-102. Actually engaging in sexual intercourse or deviate sexual activity may, under certain circumstances, constitute rape, as defined in § 5-14-103. Because each offense requires proof of elements not required by the other, a defendant can be convicted of both offenses. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980).

Burglary and Underlying Felony

Burglary is defined in § 5-39-201 as the unlawful entry of an occupiable structure with the intention of committing a felony. As indicated by the original commentary to § 5-39-201, the offense was defined so that "cumulative penalties could be imposed for entering with intent to steal and stealing." Since theft of property requires proof of an element not required to establish burglary (i.e., an actual taking of property), it follows that subsection (a) (1) does not prohibit convictions of burglary and theft of property based on the same conduct. *Cf., Higgins v. State, supra*, where such a result was reached with respect to convictions for robbery and theft of property based on the same conduct. Such a result is also supported by *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977), where the Court rejected the contention that a prior prosecution for burglary barred a subsequent prosecution for receiving the property stolen in the burglary. The Court has also indicated in dictum that a person who enters a residence for the purpose of committing rape can be convicted of both burglary and rape. *Hickerson v. State, supra*.

Necessity of Raising the Multiple Conviction Issue in the Court Below

At one time the Supreme Court took the

position that a defendant could not raise for the first time on appeal the contention that he had been convicted of multiple offenses in violation of § 5-1-110(a) (1). *Robinson v. State*, 278 Ark. 516, 648 S.W.2d 444 (1983); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), *cert. denied*, 456 U.S. 938 (1982); *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 647 (1980), *cert. denied*, 450 U.S. 1043 (1981). The Court has since relaxed the requirement, and, in fact, the issue has been raised in a number of recent cases by way of petition for post-conviction relief. *Robinson v. State*, 279 Ark. 61, 648 S.W.2d 446 (1983); *Martin v. State*, *supra*; *Barnum v. State*, *supra*; *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982). When one of two convictions must be set aside pursuant to § 5-1-110(a) (1), the Court has followed the practice of setting aside the conviction for which the lesser penalty was imposed. *Akins v. State*, *supra*; *Wilson v. State*, *supra*.

Conviction of Multiple Offenses Arising out of Same Conduct—Subsection (a) (5) of § 5-1-110, Continuing Course of Conduct

Subsection (a) (5) prohibits multiple convictions for conduct which constitutes an offense defined as a continuing course of conduct. On several occasions, a defendant has mistakenly argued that *his conduct* was a continuing course of conduct and that multiple convictions were therefore prohibited by subsection (a) (5). See, *Rowe v. State*, *supra*; *Britt v. State*, *supra*. Subsection (a) (5) applies only when *an offense* is defined as a continuing course of conduct. To determine when an offense is defined as a continuing course of conduct, the Supreme Court has adopted the test announced by Wharton at § 34 in his treatise on *Criminal Law* (11th edition):

According to that distinction, when the impulse is single but one charge lies, no matter how long the action may continue, if successive impulses are separately given, even though all unite in swelling a common stream of action, separate charges lie; and the test is whether the individual acts are prohibited or the course of action they constitute; if the former, each act is punished separately, if the latter, there can be but one penalty. We made it clear that § 41-105(1) (e) did not change the common law rule.

Rowe v. State, 271 Ark. at 24, 607 S.W.2d at 660.

Right to an Instruction on Lesser Included Offense Subsection (c) of 5-1-110

Prior to the adoption of the Code the Supreme Court had consistently held that a trial court committed reversible error if it refused to give an instruction on a lesser included offense when there was evidence on which the defendant might have been found guilty of the lesser included offense rather than the greater offense. See *Caton and Headley v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972) and cases cited therein. This principle was codified in subsection (c) of § 5-1-110, which requires the trial court to charge the jury with respect to an included offense if there is a rational basis for acquitting the defendant of the offense charged and convicting him of the included offense. Although the Code did not alter the principle *per se*, the Code did change the substantive definition of certain offenses and these changes have necessitated a re-evaluation of the application of the principle to those offenses.

See AMCI 301-02.

Capital Murder, First Degree Murder, Second Degree Murder and Manslaughter

Premeditation and deliberation are elements of capital murder, as defined in § 5-10-101(a) (2)-(4), and murder in the first degree, as defined in § 5-10-102(a) (2). They are not elements of murder in the second degree or manslaughter. When there is some evidence in the record from which the jury could find an absence of premeditation and deliberation, it is error to refuse an instruction on the lesser included offense of murder in the second degree. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979). This is particularly true when the defendant has offered some evidence of insanity or diminished capacity which, while insufficient to establish an affirmative defense under § 5-2-312, does tend to negate the premeditation and deliberation required to convict of capital murder or murder in the first degree. In *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980), the Court held that it was error to refuse to instruct on the lesser included offense of first degree murder even though the de-

fendant was charged with capital felony murder under § 5-10-101(a) (1), which does not require proof of premeditation and deliberation. The finding was apparently based on evidence, albeit slight, that the defendant did not commit or solicit the homicidal act, which would be an affirmative defense under § 5-10-101(b) to capital felony murder. *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981), held that a defendant who killed two persons in the same criminal episode was not entitled to an instruction on first degree murder when the only question was whether or not he acted with premeditation and deliberation. If he did act with premeditation and deliberation, he was guilty of capital murder. If he did not, then he was guilty of second degree murder. There was therefore no rational basis for finding him guilty of first degree murder.

Manslaughter, as defined in § 5-10-104(a) (1) does not require proof that the defendant acted with premeditation and deliberation, but it does require a showing that he acted "under the influence of extreme emotional disturbance for which there is a reasonable excuse." Although the Court in *Robinson, supra*, found error in the refusal to instruct on murder in the second degree, it approved the trial court's refusal to instruct on manslaughter since there was no evidence in the record of a reasonable excuse. A similar result was reached in *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981), in which the Court held it was not error to refuse an instruction on manslaughter when the defendant claimed accidental death and/or self defense but offered no evidence of the extreme provocation necessary to reduce murder to manslaughter. See also, *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984). In *Westbrook v. State, supra*, however, the Court ruled that the evidence warranted giving instructions on all homicide offenses down through manslaughter. Since the Court does not discuss the evidence in any detail, it is impossible to determine what evidence led to this conclusion.

Aggravated Robbery and Robbery

The distinction between the offenses of aggravated robbery, as defined in § 5-12-103(a) (1), and robbery, as defined in § 5-12-102, is that the former offense requires proof that the accused was armed with a

deadly weapon. When there is no question about whether the perpetrator of a robbery was armed, it is not error to refuse an instruction on the lesser included offense of robbery. The defendant either committed aggravated robbery, or he committed no crime at all. *Smith v. State*, 277 Ark. 403, 642 S.W.2d 299 (1982); *Lovelace v. State*, 276 Ark. 463, 637 S.W.2d 548 (1982); *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982). But if the evidence is conflicting as to whether the robber was armed, the court must instruct on the lesser included offense of robbery. *Hamilton v. State*, 262 Ark. 366, 556 S.W.2d 884 (1977). The defendant is also entitled to an instruction on robbery if he is charged as an accomplice and the evidence is conflicting as to whether he knew that the principal was armed. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Aggravated Robbery and Theft

On several occasions the Court has held that theft is not a lesser included offense of aggravated robbery (and presumably robbery) since theft requires an actual taking of property whereas robbery requires only an intent to take property. It therefore follows that a person charged with robbery is not entitled to an instruction on theft. *Savannah v. State, supra*; *Hill v. State, supra*; *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272 (1979). This result is consistent with the literal requirement of the Code since § 5-1-110(c) applies only to lesser included offenses, and theft is not a lesser included offense as set forth in § 5-1-110(b). It is conceivable, however, that a case could arise in which a theft had clearly occurred but the evidence was in dispute as to whether the perpetrator employed or threatened to employ physical force against the victim. In such a case, there would be a rational basis for acquitting of robbery but convicting of theft, and an instruction on theft would be required.

Grades of Theft

The grading of theft offenses is based on several factors, one of which is the value of the property stolen. If the value is \$2,500 or more, the theft offense is a Class B felony; if the value is more than \$200 but less than \$2,500, the theft offense is a Class C felony; otherwise the theft offense

is a Class A misdemeanor. (Note that there are factors other than value which may affect the grading of a theft offense. See Chapter 36.) If the value of stolen property is in dispute and could fall within more than one grade of theft, then an instruction on both grades must be given. If the value of the stolen property is undisputed, then an instruction on any grade of theft other than that charged is unnecessary since the defendant is either guilty of the grade of theft charged or innocent.

A rather unusual variation of the problem occurred in *Utley v. State*, 266 Ark. 794, 586 S.W.2d 242 (Ct. App. 1979) in which the defendant was apprehended in the parking lot of a department store with a shopping cart filled with merchandise which had not been paid for. The defendant did not dispute the fact that the value of the merchandise in the shopping cart exceeded the amount necessary to constitute felony theft. But he contended that he thought part of the merchandise had been paid for by a confederate and that he did not intend to take property valued at more than \$100 (\$100 was then the criterion separating felony thefts from misdemeanor thefts). The Court of Appeals ruled that it was too farfetched for the jury to conclude that the defendant actually believed that a part of the merchandise had been paid for and affirmed the trial court's refusal to instruct on the lesser included misdemeanor offense.

Burglary, Breaking or Entering, and Criminal Trespass

The similarities between the offenses of burglary (§ 5-39-201), breaking or entering (§ 5-39-202), and criminal trespass (§ 5-39-203) have prompted defendants charged with the greater offense of burglary to argue that they were entitled to instructions on the lesser included offenses of breaking and entering and/or criminal trespass. The essential difference between burglary and breaking and entering is that burglary requires proof that the defendant entered an "occupiable structure," meaning a vehicle, building, or structure where any person lives or carries on a business. See §§ 5-39-201, -203, and the definition of "occupiable structure" in § 5-39-101(1). When it is uncontested that the building entered was an

to instruct on the lesser included offense of breaking and entering. *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978); *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977). The defendant is either guilty of burglary, or he is not guilty of any offense at all. See also, *Robinson v. State*, 7 Ark. App. 209, 646 S.W.2d 714 (1983) (defendant who admitted breaking into house and car not entitled to instruction on breaking and entering). It would constitute error, however, to refuse an instruction on breaking and entering if there is a *factual* dispute as to the nature of the structure entered.

The primary difference between burglary and criminal trespass is that burglary requires proof that the defendant intended to commit a felony at the time of the unlawful entry. Consequently, when the jury could rationally find that the defendant did not have the requisite intent to commit a felony at the time of the unlawful entry, the court must give an instruction on the lesser included offense of criminal trespass. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982) (error to refuse instruction on criminal trespass after defendant contended that he broke into building to obtain keys in order to siphon gas).

The Arkansas Court of Appeals has held that one who breaks into a building with the intent to committing theft, ransacks an office, and goes to another area of the building, where he breaks into a vending machine may be convicted both of burglary (§ 5-39-201) and breaking or entering (§ 5-39-202), the prohibition of § 5-1-110(a)(1) not coming into play because "the same conduct" does not form the basis for the convictions. *Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987). The court also observed that the breaking or entering charge did not concern the building itself, but rather the coin boxes in the machines inside the building. It therefore ruled that "the offense of breaking or entering was not necessarily included in the offense of burglary." 20 Ark. App. at 178, 726 S.W. at 291. The subsection (b)(1) defense failed because the offense of breaking or entering could not be established by proof of the same or less than all the elements required to establish the burglary.

Possession and Delivery of Contraband

Glover v. State, 273 Ark. 376, 619

S.W.2d 629 (1981) and *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982) illustrate the maxim that there is no obligation to instruct on a lesser included offense when the evidence shows that the defendant is either guilty of the greater offense or innocent. Both cases involved defendants charged with delivery of a controlled substance who requested an instruction on the lesser included offense of possession of a controlled substance. In *Glover* there was evidence from which the jury could have found that no money exchanged hands. Since this is an essential element of delivery of a controlled substance, it was error to refuse to instruct on the lesser included offense of possession of a controlled substance. In *Fisk* the evidence that money had changed hands was undisputed. Consequently, the jury had to find the defendant guilty of sale of a controlled substance or innocent, and there was no error in refusing to instruct on the lesser included offense of possession.

Sexual Offenses Based on Age of Perpetrator and/or Victim

The grading of a number of sexual offenses is based on the ages of the perpetrator and/or the victim: § 5-14-104, carnal abuse in the first degree (perpetrator age 18 or older, victim less than age 14); § 5-14-106, carnal abuse in the third degree (perpetrator age 20 or older, victim less than age 16); § 5-14-107, sexual misconduct (perpetrator age irrelevant, victim less than age 16). Sexual misconduct

is necessarily a lesser included offense of the other two, but, as explained in the original commentary to § 5-14-107, the offense of sexual misconduct was designed to fill the gaps left by the other two offenses. Consequently, when there is no dispute as to the ages of the defendant and the alleged victim, the court need not charge on the lesser included offense of sexual misconduct. See, for example, *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984) (Defendant aged 27 years charged with carnal abuse in the first degree of a victim aged 7 years not entitled to an instruction on sexual misconduct).

Harmless Error

Even when there is a rational basis for submitting an instruction on an included offense, the jury's verdict may indicate any error in failing to submit the included offense was harmless. For example, in *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984), the trial court gave instructions on first and second degree battery but refused an instruction on third degree battery. The Supreme Court held that the failure to give the instruction on the included offense of third degree battery was cured when the jury returned a verdict of guilty of first degree battery. In *Love v. State*, *supra*, the fact that the jury found the defendant guilty of capital murder rather than first degree murder was held to render harmless any error in refusing to instruct on manslaughter.

1988 Supplementary Commentary to § 5-1-110

See 1983 Supplementary Commentary

Lesser Included Offenses: Public Sexual Indecency and Rape

Public sexual indecency as defined by § 5-14-111(a)(2) is not a lesser included offense of rape defined by § 5-14-103(a)(1). *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985).

Lesser Included Offenses: Robbery and Theft

In *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1984), the Court correctly stated that theft is not a lesser included offense of robbery. See *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1983). The Court went on to say, however, that "an

offense is not a lesser included offense solely because a greater offense includes all the elements of an underlying offense." 284 Ark. at 407-08, 682 S.W.2d at 745. The Court cited the "lesser included offense doctrine" and the distinction between "element included offenses" and "lesser included offenses" in support of this statement. *Id.* at 408, 682 S.W.2d at 744-45.

On the other hand, § 5-1-110(b)(1) provides:

(b) A defendant may be convicted of one offense included in another offense with which he is charged. *An offense is so included if:*

(1) It is established by proof of the same or less than all the elements

required to establish the commission of the offense charged. . .

So whatever the common-law "doctrine" may require, § 5-1-110 unequivocally defines lesser included offenses in terms of subsumed elements of a greater inclusive offense. *Thompson v. State* has been followed, however, by *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985), where the Court found that § 5-14-111(a)(2) (public sexual indecency) does not define a lesser included offense of § 5-14-111(a)(1) (rape).

Lesser Included Offenses: Attempted Capital Murder and Aggravated Robbery

Attempted capital murder under § 5-10-101(a)(2) committed against a police officer and aggravated robbery each require proof of an element not required by the other, so aggravated robbery is not a lesser included offense of attempted capital murder under this subsection. *Rhodes v. State*, 293 Ark. 211, 736 S.W.2d 284 (1987).

Lesser Included Offenses: Attempted Rape and Sexual Abuse in the First Degree

Sexual abuse in the first degree is a lesser included offense of attempted rape. *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986).

Lesser Included Offenses: Sexual Abuse in the First Degree and Indecent Exposure

The Court of Appeals has held that indecent exposure as defined by Ark. Code Ann. § 5-14-112 (1987) is not a lesser included offense of sexual abuse in the first degree defined by Ark. Code Ann. § 5-14-108 (1987). *Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985).

Lesser Included Offenses: Aggravated Robbery and Attempted First Degree Murder

In some instances, attempted first degree murder (Ark. Code Ann. §§ 5-3-201 and 5-10-102 (1987)) is a lesser included offense of aggravated robbery (§ 5-12-103 (1987)) when the aggravated robbery is charged to have been committed by "inflicting or attempting to inflict death or serious injury upon another person" with the purpose of committing a theft. *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986). The Court went on to point out that aggravated robbery is not a lesser included offense of burglary. See, also,

1983 Supplementary Commentary to 5-1-110: *Burglary and Underlying Felony*.

Lesser Included Offenses: Aggravated Robbery and Aggravated Assault

Aggravated assault defined by § 5-13-204 is a lesser included offense of aggravated robbery defined by § 5-12-103. *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988).

In *Birchett v. State*, 294 Ark. 176, 741 S.W.2d 267 (1987) appellant was convicted of robbery and aggravated assault for entering a trailer, commanding that the occupants deliver money and property, and pistol-whipping them when they refused. The Arkansas Supreme Court found that two crimes were committed and permitted both convictions, saying:

Consistent with the purpose of § 41-2102 [§ 5-12-103], the appellant committed the aggravated robbery offense when he entered the trailer and announced his intent to rob Harber and Mason. His subsequent actions to pistol-whip them constituted a separate offense, viz. aggravated assault.

294 Ark. at 181, 741 S.W.2d at 270.

Compare: *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988).

Lesser Included Offenses: Breaking or Entering and Tampering

In *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985), the Court of Appeals held that appellant could not be convicted of both breaking or entering (Ark. Code Ann. § 5-39-202 (1987)) and tampering with physical evidence (Ark. Code Ann. § 5-53-111 (1987)). After finding that there was sufficient evidence to convict of each felony, it merged the two felonies into one and affirmed the conviction for tampering with physical evidence. The court stated that "up through the point where Blair entered the vehicle to remove the container, the elements necessary to prove the commission of the two offenses were identical." *Id.* at 10, 696 S.W.2d at 759. This finding is perplexing inasmuch as entering a vehicle or the property of another is not an element of the offense of tampering. The court apparently looked at the conduct of appellant that was *actually* the basis for each conviction, not the conduct required to be proved by the statute defining the offenses, in order to determine whether the convictions were established by proof of the same acts.

A comparison of the statutory definitions of the offenses discloses that the conviction of tampering with physical evidence would not be barred by a previous conviction of breaking or entering under § 5-1-110(b)(1). Tampering requires proof of an element (destroying something) not required by the definition of breaking and entering. By the same token, breaking or entering requires proof of an element (breaking into something) not required by the definition of tampering.

See 1983 Supplementary Commentary to § 5-1-110: *Burglary and Underlying Felony* and cases cited therein.

Lesser Included Offenses: What Constitutes—Generic Class Test

Decisions defining what constitutes a lesser included offense still do not speak with one voice. In *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985), the Court stated that:

[A]n offense is not a lesser included offense solely because a greater offense includes all of the elements of an underlying offense. The lesser included offense doctrine additionally requires that the two crimes be of the same generic class and that the differences between the offenses be based on the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability.

Id. at 284 Ark. at 407-08, 682 S.W.2d at 745 (emphasis added).

The court went on to say:

Theft is the wrongful appropriation of the victim's property while robbery is the threat of physical harm to the victim. The offenses are of a different nature. They are not of the same generic class and consequently, theft is not a lesser offense included within robbery.

Id. at 408, 682 S.W.2d at 745, citing *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980) and *Hill v. State*, 276 Ark. 300, 634 S.W.2d 120 (1982).

But in cases such as *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986) the Court has explicitly found that even though two offenses are of different generic classes, one may be a lesser included offense of the other. In *Trotter* the Court vacated an aggravated robbery conviction but simultaneously found appellant guilty of the

uncharged lesser included offense of first degree battery. The Court's finding that aggravated robbery and first degree battery are of different generic classes is questionable: the Court has observed on several occasions that the gravamen of aggravated robbery is violence or the threat of violence against the person. *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983). Accordingly, aggravated robbery and first degree battery are less distantly related than indicated by the Court.

Again, it should be observed that § 5-1-110 does not distinguish between "lesser included offenses" and "element included offenses."

While first degree battery charged under § 5-13-201(a)(1) or (3) may be a lesser included offense of aggravated robbery charged under § 5-12-103(a)(2), *Trotter v. State*, assaults and batteries have been held not to be lesser included offenses of robbery charged under § 5-12-102. See *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985).

Lesser Included Offenses: Instructions Given Over Defendant's Objection

Both the Arkansas Supreme Court and the Arkansas Court of Appeals have held that the trial judge may submit an instruction on a lesser included offense over the defendant's objection where there is a reasonable basis on which he may be found guilty of the lesser offense. See, for example, *Hinson v. State*, 18 Ark. App. 14, 709 S.W.2d 106 (1986), where the Arkansas Court of Appeals upheld appellant's conviction of third degree battery despite his argument on appeal that the case was tried on an "all-or-nothing" basis and that he had geared his entire defense to disproving charges of first degree battery.

Lesser Included Offenses: What Constitutes "Rational Basis" under § 5-1-110(c)

As the Arkansas Supreme Court and the Court of Appeals have frequently pointed out, "no right has been more zealously protected than the right of an accused to have the jury instructed on lesser included offenses." *Williams v. State*, 17 Ark. App. 53, 56, 702 S.W.2d 825, 827 (1986). So, even where the victim died from five stab wounds, the Court of Ap-

peals has found that the jury could have believed appellant's testimony that the wounds were inflicted "recklessly". Appellant was entitled to an instruction on manslaughter. *Williams v. State*.

Lesser Included Offenses: Instruction on First Degree Murder Required in Capital Murder Trials

In *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986), the Arkansas Supreme Court concluded that a defendant charged with capital murder under Ark. Code Ann. § 5-10-101 (1987) for killing his victim in the course of a burglary was also charged with murder in the first degree under Ark. Code Ann. § 5-10-102 (1987), since evidence that one has committed a homicide in the course of a burglary is also evidence that he is guilty of homicide in the course of a "felony" under § 5-10-102. In all such cases, an instruction on first degree murder is required if requested.

Lesser Included Offenses: Instructions Not Required

In two recent cases the Arkansas Supreme Court has held that where a defendant is convicted of a serious offense, having been acquitted of a less serious included offense on which the jury was instructed, the trial court's refusal to submit instructions on an even less serious offense cannot be prejudicial. *McKinnon v. State*, 287 Ark. 1, 3, 695 S.W.2d 826, 827 (1985), citing *Sherron v. State*, 285 Ark. 8, 684 S.W.2d 247 (1985).

Lesser Included Offense Instructions: Purposeful vs. Reckless Conduct

Appellant in *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986) argued on appeal from a conviction of aggravated assault that the trial court committed reversible error by refusing to instruct the jury on lesser included offenses of first, second, and third degree assault. The testimony established that appellant stuck a pistol through the open window of a car, pointing it at an occupant who grabbed it and opened the door, knocking appellant down. The Court of Appeals reversed appellant's conviction, finding that there was no basis in the record to find that appellant acted other than purposely but that the trial court should have instructed the jury on third degree assault, which is defined in terms of purposely created apprehension of imminent physical injury.

The court rejected appellant's argument about first and second degree assault because both offenses are framed in terms of *reckless* conduct. It should be noted, however, that under § 5-2-203(c) proof of a higher culpable mental state will suffice to establish a conviction of an offense defined in terms of a lower mental state. Accordingly, a jury could have convicted appellant of first degree assault on the basis of purposeful conduct even though the offense only requires proof of reckless conduct. See § 5-13-205.

Multiple Convictions Based on Same Conduct

In *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985) the Court of Appeals upheld the defendant's convictions of burglary and attempted rape.

The evidence showed that the defendant entered the victim's home uninvited and solicited sex without physically abusing her or attempting to do so. The victim became agitated, ran from her home, and contacted the police, who arrested the defendant shortly thereafter. The court found that the unlawful entry followed by the defendant's entreaties constituted "a substantial step in a course of conduct intended to culminate in the commission of an offense." § 5-3-201(a)(2).

The four judge majority opinion did not touch on whether convictions of both attempted rape and burglary could stand under § 5-1-110 since this issue was not raised at trial or briefed on appeal. A concurring opinion argued, however, that had the question been faced both convictions should stand because "it is not necessary to prove an unlawful entry into an occupiable structure to establish rape or attempted rape." *Id.* at 140, 690 S.W.2d at 736.

Two judges dissented from the affirmation of both convictions, stating that, since the court found that the defendant's entry into the house and the solicitation of the victim constituted the substantial step on which defendant's conviction of attempted rape was based, the convictions were *in fact* based upon the same conduct. In other words, the concurring opinion interprets § 5-1-110 to require that the Court compare statutory definitions in determining whether one offense "is established by proof of the same or less than all the elements required to establish the

commission of [another offense]." § 5-1-110(b)(1). The dissent, on the other hand, seems to argue that the determination should turn on whether the same conduct is *actually* the basis for each conviction. No Arkansas case has been found in which these alternative readings of § 5-1-110 have been drawn in issue. Since the majority in *Avery* did not reach this issue, the question has not yet been decided. It should be noted, however, that in *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983) in a discussion of whether convictions for battery in the first degree under § 5-13-201(a)(4) and aggravated robbery could stand, the Court said:

The information charged battery in the first degree by use of the pistol which was used to commit the aggravated robbery. Therefore, *the facts of the present case required proof of the aggravated robbery, the underlying felony, in the course of proving battery in the first degree which was alleged to have been committed during the course of a felony. Under the informations here in question the greater offense was actually included in the lesser offense.*

Id. at 183, 644 S.W.2d 275.

When Obligation to Charge Lesser Included Offense Arises under § 5-1-110(c)

In *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986), the Court held that when a defendant asserts that he is entirely innocent of any crime, then no rational basis exists to instruct the jury on a lesser included offense, as the only issue for the jury is whether the defendant is guilty as charged. *Doby* was charged with possession of drugs with intent to deliver. He denied ever possessing any drugs but insisted at trial that he was entitled to an instruction on the lesser included offense of simple possession. The Arkansas Supreme Court upheld the trial court's refusal to give the instruction, overruling *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986), and *Flurry v. State*, 18 Ark. App. 64, 711 S.W.2d 163 (1986). The Court also discussed, but did not overrule, *Fike v. State*, 255 Ark. 956, 504 S.W.2d 363 (1974), where the defendant was convicted of assault with intent to rape after the trial court refused to instruct the jury on the lesser included offense of assault. Reversing, in *Fike* said:

In the case at bar, it is not questioned that the prosecutrix's testimony is sufficient to sustain the verdict of assault with intent to rape. However, the jury has the sole prerogative to accept all or any part of a witness' testimony *whether controverted or not*. Therefore the jury had the absolute right, as trier of the facts, to evaluate the evidence and consider whether only an unlawful assault was committed upon her by appellant or even acquit him.

255 Ark. at 959, 504 S.W.2d at 365 (emphasis added).

Three justices dissented in *Doby*. Justices Purtle and Dudley joined Justice Newbern in arguing that the majority opinion suggests that "if the jury disbelieves the appellant's testimony it must believe all of the testimony presented by the appellee's witnesses if any of it is credible." *Doby* at 414, 720 S.W.2d at 697. The dissent went on to predict that the case would "be construed as holding that anytime a criminal defendant denies having committed any of the acts with which he is charged, he is entitled to no instructions on lesser included offenses." *Id.* at 414, 720 S.W.2d at 697. See, also, *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986), decided the same day.

In *Fladung v. State*, 292 Ark. 510, 730 S.W.2d 901 (1987), decided six months later, appellant was convicted below of attempted capital murder of an Arkansas State Trooper. The Trooper testified that after he stopped appellant's car, appellant groped under the front seat on the passenger's side, produced a pistol, aimed it at the Trooper's torso, pulled the trigger at least once and probably twice, and said something unintelligible before the Trooper was able to take away the pistol. Appellant said that he produced the pistol to explain that it did not work and that the Trooper grabbed it, causing it to discharge. He testified that he never pointed the pistol at the Trooper and *had no intention of harming him*.

The trial court denied appellant's motion that the jury be instructed on the lesser included offenses of aggravated assault and first degree assault. On appeal the Arkansas Supreme Court agreed with appellant and reversed, finding that the testimony of appellant and the Trooper were much the same until appellant

turned in the seat with the pistol, after which their stories diverged. The Court found that the jury could have believed all of either version of the events or parts of each version. Justice Hickman dissented without opinion.

The Court distinguished the circumstances of *Fladung* from those of *Doby* by pointing out that in *Fladung* appellant never denied that he produced a pistol and that his defense was based upon his purpose in producing the pistol. Nonetheless, if appellant's purpose is a question of fact the same as possession of a pistol or drugs, then it is difficult to distinguish *Fladung* from *Doby* in principle. See, also, *Fike v. State*, 255 Ark. 956, 504 S.W.2d 363 (1974).

It is reasonably clear, however, that where the defense is alibi, no lesser included offense instruction is necessary. *Roberts v. State*, 281 Ark. 218, 663 S.W.2d 178 (1984). And, where a defendant is charged with possession for one purpose, he cannot simultaneously maintain that (1) he possessed nothing and (2) he is entitled to an instruction on possession for another less serious purpose. *Doby v. State*, *supra*. See, also, *Conley v. State*, 20 Ark. App. 56, 723 S.W.2d 841 (1987), where the Court of Appeals upheld the trial court's refusal to instruct the jury on sexual abuse in the first degree as a lesser included offense of the charge of rape, appellant having consistently denied that any act construable as either rape or sexual abuse ever occurred.

Inconsistent Verdicts

Trials of more than one charge arising out of a single criminal scheme may yield inconsistent verdicts, which are attacked

on grounds of inconsistency. For example, in *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986), appellant was tried for forgery and escape after he made an unauthorized departure from the Arkansas Department of Correction after a forged court order dismissing the grand larceny, burglary, and armed robbery charges on which he had been convicted was received by prison officials. Appellant was convicted of escape but acquitted of forgery. He argued that these verdicts were inconsistent and that the escape conviction must be set aside. The Court responded as follows:

We need not examine the argument in detail since consistency in verdicts is not necessary. Each count in an information or indictment is regarded as if it were a separate information or indictment. [citations omitted] ... If separate informations had been filed against appellant for escape and forgery, and had been separately tried, and the same evidence presented in both cases, an acquittal on one could not be pleaded as collateral estoppel to the other. Where the same offenses are separately charged in two counts of one information, the same rule must hold.

290 Ark. at 18, 716 S.W.2d at 195.

Section 5-1-110 would not bar conviction of both offenses on proof of the same criminal transaction for, as pointed out in the commentary, "the same conduct" has a narrower purview than a "single scheme" in which criminal acts are performed at different times. For this reason an acquittal or conviction on one charge would not bar subsequent prosecution for the other under § 5-1-113(1)(B).

Original Commentary to § 5-1-111

This section restates the traditional requirement that the prosecution must prove the commission of an offense beyond a reasonable doubt. Former law was found at Ark. Stat. Ann. § 43-2159 (Repl. 1964): "Where there is reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal." Section 5-1-111 specifies exactly what must be proved beyond a reasonable doubt. It also defines three procedural tools — presumption, defense, and affirmative defense — that are used in this

Code and may hereafter be used by future draftsmen to alleviate or shift the burden of proof. The section is not intended, and should not be interpreted, to affect in any manner the necessary contents of an indictment, an information, or other charging instrument.

Subsection (a)(1) requires that the state prove each element of the offense beyond a reasonable doubt. "Element of the offense" is defined in § 5-1-102 as "the conduct, the attendant circumstances, and the result of conduct that (a) is specified in the

definition of the offense; or (b) establishes the kind of culpable mental state required for commission of the offense; or (c) negates an excuse or justification for the conduct."

Under subsections (a)(2) and (a)(3), the state must prove the facts necessary to establish jurisdiction and venue. On at least one occasion, the Arkansas Supreme Court has stated that the burden is on defendant to establish lack of jurisdiction. *Kurck v. State*, 235 Ark. 688, 362 S.W. 2d 713 (1962), cert. denied, 373 U.S. 910, 83 S. Ct. 1299, 10 L. Ed. 2d 412 (1963). However, jurisdiction in that case turned on a question of law, not a question of fact. If jurisdiction had depended on a factual determination, the Court would probably have placed on the state the burden of proof with respect to the facts. Though it was clear that under former law the state had to prove the existence of venue, the evidence was tested by the preponderance of the evidence standard rather than the beyond a reasonable doubt standard. *Douglass v. State*, 91 Ark. 492, 121 S.W. 923 (1909); *Wilson v. State*, 62 Ark. 497, 36 S.W. 842 (1896). The Code subsection requires that the state prove both jurisdiction and venue beyond a reasonable doubt. Although recognizing the distinction between facts that establish the substantive offense and those that satisfy procedural requirements, the Commission was persuaded by the Model Penal Code's argument that "[s]o long as venue and jurisdiction present questions for the jury on the general issue, . . . no slight relaxation on the burden [of proof] possibly can compensate for the confusion likely to be caused by utilizing any double standard of this kind." *M.P.C. § 1.13, Comment at 109 (Tent. Draft No. 4, 1955)*. The difficulties often encountered in distinguishing jurisdiction from venue argue strongly, if not for the greater standard of proof, at least for the same standard of proof with respect to both issues.

Subsection (a)(4), requiring the state to prove the commission of the offense within the statute of limitations, represents no change from old law. *Williams v. City of Malvern*, 222 Ark. 432, 261 S.W. 2d 6 (1953); *James v. State*, 110 Ark. 170, 160 S.W. 1090 (1913). It was unclear under former law whether the state had to do so beyond a reasonable doubt or by a mere preponderance of the evidence. For the

reason stated above — i.e., that varying burdens of proof tend to confuse jurors — the Code section adopts the higher standard of proof.

Subsection (b) alleviates somewhat the state's burden of proof with respect to jurisdiction and venue. It is designed to achieve the same result as former Ark. Stat. Ann. § 43-1426 (Repl. 1964) stating that: "It shall be presumed upon trial that the offense charged in the indictment was committed within the jurisdiction of the court, and the court may pronounce the proper judgment accordingly, unless the evidence affirmatively shows otherwise." The language has been changed to eliminate the word "presumed" since a presumption, as explained below, has a special procedural effect not really appropriate to this context. The subsection's coverage has been broadened to include "venue" as well as "jurisdiction," thus obviating any necessity to distinguish between the two terms. The proposed subsection retains the requirement that the evidence must "affirmatively show" a lack of jurisdiction or venue before the state's burden arises. Although an authoritative construction of the phrase "affirmatively shows" is lacking, it was the Commission's view that this language required a defendant wishing to raise jurisdictional or venue questions to do more than simply demonstrate a lack of proof as to where the offense occurred. There must be *positive* evidence that the offense occurred outside the jurisdiction or venue of the court.

Subsection (c) sets out the effect of an ordinary "defense." Since the term "element of the offense" is defined to include "the conduct, the attendant circumstances, and the result of conduct that negates an excuse or justification for the conduct," subsection (a) requires the state to prove beyond a reasonable doubt the nonexistence of a "defense." Subsection (c) eases this burden by providing that the state need not disprove a defense until it is raised. A defense is raised when evidence is introduced by either the prosecution or defense supporting its existence. The procedural consequences of a defense appear to be the same under prior law. See, *Richardson v. State*, 77 Ark. 321, 91 S.W. 758 (1905); *Cogburn v. State*, 76 Ark. 110, 88 S.W. 822 (1905) (self-defense). The last sentence defines "defense." All de-

fenses expressly recognized by the Code will be preceded by language such as "It is a defense to prosecution that. . . ." Subsection (c)(2) is included in case a statute outside the Code creates a defense. Subsection (c)(3) is a catchall clause designed to cover the situation where there is no legislation expressly identifying certain facts or circumstances as a "defense." Such a defense may be based on a past or future court decision. It could also result from language excepting certain persons or conduct from the application of a criminal statute. The rule has evolved in Arkansas that if an exception is contained in the enacting clause of a statute, the state must negate the exception in both the charging instrument and its case in chief. If the exception is contained in a proviso to the statute, the charging instrument need not negate the exception and the state need not disprove it until defendant introduces facts that bring him or his conduct within the exception. See, *Collier v. State*, 183 Ark. 1057, 40 S.W. 2d 455 (1931); *Richardson v. State*, *supra*. It was the Commission's belief that the latter type of exception falls within the meaning of "defense" as described in (c)(3). Hence, subsection (c)(3) effects no change in the procedural consequences of the "exception" doctrine.

Subsection (d) places on the defendant the burden of raising an affirmative defense and proving it by a preponderance of the evidence. The last sentence makes it clear that all affirmative defenses are so designated either by the Code or a statute outside the Code. Thus, any ambiguity as to whether a defense is "affirmative" or "ordinary" is resolved in favor of the latter. Arkansas courts previously treated three defenses as "affirmative": (1) former jeopardy — *Richards v. State*, 108 Ark. 87, 157 S.W. 141 (1913); *Jacobs v. State*, 100 Ark. 591, 141 S.W. 489 (1911); (2) insanity — *Stewart v. State*, 233 Ark. 458, 345 S.W. 2d 472 (1961); *Korsak v. State*, 202 Ark. 921, 154 S.W.2d 348 (1941); *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915); and (3) entrapment — *Brown v. State*, 248 Ark. 561, 453 S.W. 2d 50 (1970). All three remain affirmative defenses under the Code. See, §§ 5-1-112 to -114 (former jeopardy); § 5-2-209 (entrapment); § 5-2-312 (mental disease or defect). In addition, the Code establishes several new affirmative defenses. See, e.g., §§ 5-10-102(b); 5-10-

104(b); 5-13-201(b). Certain Code sections also make use of a partial affirmative defense. If a defendant succeeds in proving by a preponderance of the evidence the existence of certain facts, he is not relieved of liability but the seriousness of the offense is reduced. See, e.g., § 5-11-102(b).

Subsection (e) attempts to provide guidance as to when and how a jury should be instructed respecting a statutorily created presumption. In drafting the provision the Commission recognized the need to comply with article 7, section 23 of the Arkansas Constitution, prohibiting judicial comment on the evidence in a case. One of the Arkansas Supreme Court's most recent pronouncements on the subject, *French v. State*, 256 Ark. 298, 506 S.W. 2d 820 (1974), seems to require that an instruction based on a statutorily created presumption conform to the following requirements.

The trial court cannot instruct the jury that a specific fact or facts (basic facts) give rise to a presumption of another fact (presumed fact). Although proof of the basic fact is sufficient to sustain a finding of the presumed fact if the verdict is challenged on appeal, the trial court commits error if it focuses the attention of the jury on the basic fact and implies that proof of the basic fact alone will support a finding of the presumed fact. Instead, the court must phrase its instruction so as to indicate that the basic fact is merely evidence of the presumed fact to be considered along with all the other evidence of the presumed fact. A close reading of *French* and the cases cited therein supports the conclusion that a common feature of virtually all the presumption instructions previously disapproved by the Supreme Court has been the undue judicial emphasis on the basic fact. *French v. State*, *supra*; *Reno & Stark v. State*, 241 Ark. 127, 406 S.W. 2d 372 (1966); *Thiel v. Dove*, 229 Ark. 601, 317 S.W. 2d 121 (1958); *Blankenship v. State*, 55 Ark. 244, 18 S.W. 54 (1891); *Haley v. State*, 49 Ark. 147, 4 S.W. 746 (1886). On the other hand, the Court has repeatedly approved instructions that de-emphasize the importance of the basic fact by specifying that the basic fact is merely to be considered in the context of all other evidence in the case. See, *Petty v. State*, 245 Ark. 808, 810, 434 S.W. 2d 602 (1968); *Johnson v. State*,

190 Ark. 979, 82 S.W. 2d 521 (1935); *McDonald v. State*, 165 Ark. 411, 264 S.W. 961 (1924); *Barron v. State*, 155 Ark. 80, 82, 244 S.W. 331 (1922); *Pearrow v. State*, 146 Ark. 182, 225 S.W. 311 (1920); *Hogue v. State*, 93 Ark. 316, 124 S.W. 783 (1910).

Subsection (e)(1) states one effect of a presumption that has never been seriously in dispute. Once the state introduces evidence of the facts on which a presumption is based, it has established a prima facie case and thus in most instances avoids a directed verdict. The

qualifying proviso to subsection (e)(1) ensures that a court may direct a verdict for the defendant, notwithstanding introduction of evidence, if the evidence, taken as a whole, indicates the existence of the presumed fact is highly improbable.

Subsection (e)(2) takes the form of a model instruction to be used whenever a criminal statute establishes a presumption. It is taken, almost verbatim, from the instruction upheld in *Barron v. State*, *supra*, and expressly approved in several subsequent cases.

1988 Supplementary Commentary to § 5-1-111

There have been a number of cases involving the various matters designated “defenses” or “affirmative defenses” by sections of the Code. These cases are discussed in the supplementary commentary to such code sections. *See*, for example, the supplementary commentary to §§ 5-2-207 and 5-2-312.

Subsection (b): Jurisdiction

The first case after the enactment of the Code in which the territorial jurisdiction of the court was an issue was *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979), which is discussed *supra* in the supplementary commentary to § 5-1-104. In *Gardner*, the Court reiterated the statement in the original commentary to § 5-1-111(b) to the effect that the defendant who wishes to raise jurisdictional questions must do more than simply demonstrate a lack of proof as to where the offense occurred. “(B)efore the state is called upon to offer any evidence on the question of jurisdiction, there must be positive evidence that the offense occurred outside the jurisdiction of the court.” 263 Ark. at 746, 569 S.W.2d at 77.

In *Richards v. State*, 279 Ark. 219, 650 S.W.2d 566 (1983), the defendant was charged with the murder of a woman whose body was found along the freeway. The Supreme Court rejected the defense contention that medical evidence indicating that the victim was dead when she left the defendant’s car constituted affirmative evidence that she was killed in any particular place.

The “positive evidence” requirement imposes a significant burden on the defendant seeking to compel the State to prove

jurisdiction or venue. Even in a case where the probable murder weapon was found in Faulkner County and a police chief investigating the crime testified that his opinion was the victim had been killed in Faulkner County where the weapon was found, the Court upheld appellant’s conviction in Conway County, finding that this testimony did not constitute the “positive evidence” required by *Gardner v. State*. *See Dix v. State*, 290 Ark. 28, 715 S.W.2d 879 (1986).

Subsection (c): Defenses

Subsection (c) states that the trial court must submit the issue of the existence of a defense to the jury once evidence is admitted supporting the defense. Such evidence may be offered by either the state or the defense. *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979); *Thomas v. State*, 266 Ark. 162, 583 S.W.2d 32 (1979). But before a defendant can complain about the failure to submit a defense to the jury, he must first request an instruction regarding the defense. Absent such a request, he cannot argue for the first time on appeal that the evidence introduced at trial supported a defense that should have been submitted to the jury. *See Schwindling v. State*, 269 Ark. 388, 602 S.W.2d 639 (1980).

See AMCI 4001, 4005-07.

Subsection (d): Affirmative Defenses

Although the United States Supreme Court decision in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), may have cast doubt on a procedural scheme which places on the defendant the burden of proving by a preponderance of the evidence those defenses designated as “affirmative defenses,”

these doubts have apparently been resolved in favor of such a scheme by the Court's subsequent opinion in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). That, at least, is the conclusion of the Arkansas Supreme Court. *Hobgood v. State*, 262 Ark. 725, 562 S.W.2d 41, *cert. denied*, 439 U.S. 963, 99

S.Ct. 449, 58 L.Ed.2d 421 (1978). *Mullaney v. Wilbur*, which involved the constitutionality of requiring the defendant to prove the affirmative defense of insanity by a preponderance of the evidence, is discussed in the supplementary commentary to § 5-2-312.

Original Commentary to § 5-1-112

This section, based on M.P.C. § 108, is addressed to double jeopardy in its narrowest sense — i.e., when a defendant is prosecuted a second time for the *same offense*. *Same offense* means a violation of the *same statute* based on the *same act* directed at the *same person*. If the second prosecution is (1) based on violation of a different statute or (2) based on acts that, though closely connected in time, are distinct or (3) based on injury to the person or property of different persons, then the second prosecution is for a *different offense* and double jeopardy claims are resolved by § 5-1-113. The distinction between *same offense* and *different offense* will not be as important under the Code since a previous prosecution is given almost the same effect in both situations. A previous conviction or acquittal will always bar a subsequent prosecution for the same offense. A conviction or acquittal will also bar a subsequent prosecution for a different offense based on the same conduct, except in the circumstances described in § 5-1-113(1)(B). If different offenses are committed because different statutes are violated, the second prosecution is barred unless the statutes are directed at different evils. If different offenses are committed because two distinct acts are involved, the second prosecution is barred unless the acts are so chronologically disconnected as to not be a part of the same conduct. If different offenses are committed because different people are injured, the second prosecution is always barred. In view of the fact that a second prosecution will frequently be barred, notwithstanding the fact that it is for a *different* rather than the *same* offense, it may appear anticlimactic to add that the distinction between same offense and different offense discussed above is in accord with that previously drawn by the Arkansas courts. That the same act may constitute

different offenses because it violates different statutes is well settled. *Bingaman v. State*, 181 Ark. 94, 24 S.W. 969 (1930). Equally well established is the proposition that contravention of the same statute by distinct acts results in two offenses. *Bell v. State*, 120 Ark. 530, 180 S.W. 186 (1915). The really difficult issue is whether two offenses are committed when violation of a single statute by a single act causes injury to the person or property of more than one person. In the context of homicide, the Supreme Court has clearly indicated that a single act that kills two persons constitutes two offenses. See, *Holder v. Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949). However, there is dictum in the same case to the effect that theft of property from two persons by the same act is only one offense. This seems difficult to square with either *Holder v. Fraser*, or with subsequent decisions which indicate that possession of property stolen from different persons constitutes different offenses. See, *Laird v. State*, 251 Ark. 1074, 476 S.W.2d 811 (1972); see, also, *Patterson v. State*, 253 Ark. 393, 486 S.W.2d 19 (1972). In summary, the terms "same offense" and "different offense," as used in this and the succeeding section carry with them their traditional meanings. However, as discussed above and as further elucidated in the Commentary to § 5-1-113(1)(B), the Code may bar a second prosecution for a different offense in circumstances where, heretofore, a second prosecution was permitted.

Under §§ 5-1-112 to -114, former jeopardy is an affirmative defense. The effect is to place on the defendant the burden of raising and proving by a preponderance of the evidence that a former prosecution bars the present trial. See, § 5-1-111(d). Since most former jeopardy claims involve questions of law, the burden of proof on the issue is typically an irrelevant consid-

eration. However, it is conceivable that a question of fact might arise in the double jeopardy context — e.g., whether defendant actually was the person previously tried — and the Code makes clear that defendant must prove such a fact. This comports with prior decisions. *Richards v. State*, 108 Ark. 87, 157 S.W. 141 (1913); *Jacobs v. State*, 100 Ark. 591, 141 S.W. 489 (1911).

If a defendant has previously been prosecuted, a second prosecution for the *same offense* is barred in three situations. The first is when the previous prosecution resulted in an acquittal. This restates previous Arkansas law found at Ark. Stat. Ann. § 43-1224 (Repl. 1964). Acquittal is defined as a “determination of not guilty.” Cf. prior law codified as Ark. Stat. Ann. § 43-1224.3 (Supp. 1973). The entry of a formal judgment of acquittal is not essential; the jury’s finding of not guilty is sufficient in itself to bar further prosecutions. The section also provides that conviction of an included offense constitutes acquittal of higher degrees of the same offense. If the conviction is reversed, the state may retry only the lesser offense. This codifies a rule that has been in effect in Arkansas for over a hundred years. See, *Fuller & Walton v. State*, 246 Ark. 704, 439 S.W.2d 801 (1969), citing, *Johnson v. State*, 29 Ark. 31 (1874).

Subsection (2) provides that a conviction bars a subsequent prosecution for the same offense. Cf. pre-existing law at Ark. Stat. Ann. § 43-1224 (Repl. 1964). The definition of conviction is taken almost verbatim from old authority found at Ark. Stat. Ann. § 43-1224.3(2) (Supp. 1973). The only change has been the addition of “or nolo contendere” in the last clause. A judgment of conviction is quite obviously a conviction, but even in the absence of a formal entry of judgment, a plea or verdict constitutes a conviction. Thus, if the court suspends imposition of sentence or places defendant on probation without entering a judgment of conviction, a dissatisfied prosecutor cannot refile the same charges in another court since there is a “conviction” for purposes of former jeopardy.

Subsection (3), providing that improper termination of a prosecution after jeopardy has attached will bar future prosecutions for the same offense, is essentially a restatement of present case law. See, *Cody & Muse v. State*, 237 Ark. 15, 371 S.W.2d

143 (1963) and cases cited below. There appears to be considerable conflict among jurisdictions as to when jeopardy attaches. With respect to trials by jury, the Supreme Court has long since aligned Arkansas with those jurisdictions where jeopardy attaches at the time the jury is sworn. *Lee v. State*, 26 Ark. 260 (1870). The issue as to when jeopardy attaches in a non-jury trial has never arisen in Arkansas, but the Code formulation — i.e., when the first witness is sworn — appears to be the accepted rule. *M.P.C. § 1.09, Comment at 53 (Tent. Draft No. 5, 1956)*; *Serfass v. United States*, 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975).

Termination after jeopardy attaches is proper under two circumstances. The first is when the defendant expressly or impliedly consents to the termination. Express consent occurs when the defendant moves to terminate the trial or agrees to termination on motion of the court or the state. The Model Penal Code declined to take a stand on whether mere failure to object to termination constitutes implied consent. Fortunately, the Arkansas Supreme Court has addressed the issue, developing what the Commission felt was a workable definition of implied consent. See, *Franklin v. State*, 149 Ark. 546, 233 S.W. 688 (1921), and *Burnett v. State*, 76 Ark. 295, 88 S.W. 956 (1905). Consent is implied if the defendant fails to object to termination and the termination is for the benefit of defendant. If the termination is for the benefit of the state, mere failure to object does not constitute consent.

The second circumstance in which termination is proper is when it is justified by “overruling necessity.” The latter phrase has become a judicial term of art used to subsume the various exigent circumstances that justify declaring a mistrial. Although M.P.C. § 1.08(4)(b) lists five specific reasons that justify terminating a trial, the Commission preferred the general term “overruling necessity” in view of its flexibility and the considerable body of case law giving it content. The Model Penal Code provisions are set out below since the Commission feels they are illustrative of the circumstances encompassed by the term “overruling necessity”:

(1) It is physically impossible to proceed with the trial in conformity with law. See, *Franklin & Reed v. State*, 251 Ark. 223, 471 S.W.2d 760 (1971) (intoxication of

defense counsel); *Atkins v. State*, 16 Ark. 568 (1855) (illness of juror).

(2) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law. See, *State v. Ward*, 48 Ark. 36, 2 S.W. 191 (1886) (defective indictment); *Williams v. State*, 42 Ark. 35 (1883) (same).

(3) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the state. See, *McKenzie v. State*, 26 Ark. 334 (1870) (witness communicated with juror).

(4) The jury is unable to agree upon a verdict. See, *Potter v. State*, 42 Ark. 29 (1883).

(5) False statements of a juror on voir dire prevent a fair trial. See, *McDaniel v.*

State, 228 Ark. 1122, 313 S.W.2d 77 (1958) (juror related to defendant); *Harris v. State*, 177 Ark. 186, 6 S.W.2d 34 (1928) (juror signed defendant's appearance bond); *Martin v. State*, 163 Ark. 103, 259 S.W. 6 (1924) (juror had previously served on jury in former trial of same case); *Martin v. State*, 161 Ark. 423, 256 S.W. 367 (1924) (juror had served on grand jury in same case); *Franklin v. State*, 149 Ark. 546, 233 S.W. 688 (1921) (juror had served on jury in previous trial of related case).

For examples of reasons that do not justify termination of a trial, see, *Cody and Muse, supra* (defendant's insanity becomes an issue for first time during trial) and *Jones v. State*, 230 Ark. 18, 320 S.W.2d 645 (1959) (juror related to witness).

1988 Supplementary Commentary to § 5-1-112

When an appellate court finds that the evidence was insufficient to support a conviction, the double jeopardy clause of the United States Constitution prohibits a retrial for the same offense. See, *Green v. Massey*, 437 U.S. 19 (1978), applied in *Nichols v. State*, 280 Ark. 173, 655 S.W.2d 450 (1983); *Roleson v. State*, 277 Ark. 148, 614 S.W.2d 656 (1981); *Pollard v. State*, 264 Ark. 753, 574 S.W.2d 656 (1978).

In *Daniels v. State*, 12 Ark. App. 251, 674 S.W.2d 949 (1984), the Court of Appeals held that a three week continuance granted the state over the objection of the defendant did not constitute a "termination" of prosecution under § 5-1-112. The continuance was granted during the course of a bench trial when it became apparent that the State could not produce a witness competent to give critical testimony. Distinguishing *Downum v. United States*, 372 U.S. 734 (1963) (defendant subjected to double jeopardy when, in course of trial, first jury dismissed and second impaneled two days later because of absence of prosecution witness), the Court of Appeals found that "the proceedings were merely continued and then resumed, not terminated and then begun anew." *Id.* at 253, 674 S.W.2d at 951.

Successive Trials: No Res Judicata Effect of Jury Verdict on Firearm in First Trial

Appellant was initially convicted of kidnapping, burglary, and rape. The jury

found that he did not use a firearm in the commission of these offenses. The guilty verdicts were reversed on appeal. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984). Appellant was retried on kidnapping charges. The trial court permitted prosecution witnesses to testify that appellant used a firearm. Appellant was again convicted of kidnapping and on appeal argued for a reversal on grounds of *res judicata* and law of the case. He claimed that the verdict of the first jury that he had not used a firearm precluded State's witnesses from testifying that he was armed in the second trial, even though no enhancement under § 5-4-505 was sought at the latter trial. The Court agreed with appellant that he could not be tried again for using a firearm, but it found that the trial court had not committed error by permitting witnesses to testify that appellant had a firearm. The Court opined as follows:

Whether Hickerson used a gun was not at issue on retrial, but the victim's perception of the events was relevant. The evidence of the use of the gun was obviously relevant, although not essential, to the charge of kidnapping which contains the element of restraint without consent. ... So, the admissibility of testimony regarding the gun was not precluded by the doctrine of *res judicata* or law of the case on a retrial.

Hickerson v. State, 286 Ark. 450, 452, 693 S.W.2d 58, 59 (1985).

Justice Purtle dissented, arguing that the firearm issue was conclusively settled in the first trial.

The issue raised is a perplexing one. The majority opinion cites 2 *Weinstein's Evidence* § 404 (10) (1984). This states:

Most courts allow the use of evidence previously introduced on counts on which defendant has been *acquitted*, or as to which there has been a *dismissal*, since the prior acquittal or dismissal indicates only that the prosecution did not prove the underlying facts beyond a reasonable doubt, a higher standard than is ordinarily required for the introduction of other crimes evidence. However, a number of courts have, somewhat illogically, extended the doctrine of collateral estoppel to this area, holding that an acquittal bars the prosecution from using evidence of that offense as other

crimes evidence at a subsequent trial. (Emphasis added.)

Whether this rationale supports the conclusion reached in *Hickerson* is questionable. The jury verdict at the conclusion of the first trial was in the form of a special verdict with a specific finding that defendant did not use a firearm. This case therefore differs from those where the jury acquitted the defendant on the initial charge and a trial follows at which witnesses testify about conduct also disclosed at the first trial. It cannot be argued, for example, that the first jury found that appellant did not use a firearm in the course of committing a felony because he did not commit the felony charged. In *Hickerson* the first jury *convicted* appellant of the felonies charged but explicitly found that he did *not* do so with a firearm. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984).

Original Commentary to § 5-1-113

This section defines the limits of former jeopardy when the second prosecution is for a *different offense*. As explained in the *Commentary* to § 5-1-112, a person commits different offenses when he violates different statutes, when he engages in distinct acts, or when he injures different persons.

A second prosecution for a different offense is barred under four circumstances, which, with minor variations, parallel the circumstances that under § 5-1-112 bar a second prosecution for the same offense.

Subsection (1)(A) provides a bar to prosecution for any offense of which the defendant could have been convicted at an earlier trial. Accord, *State v. Lismore*, 94 Ark. 211, 126 S.W. 855 (1910). Its most frequent effect will be to bar a second prosecution for a lesser included offense, following either conviction or acquittal of the greater inclusive offense. Cf., *State v. Lamb and Taylor*, 251 Ark. 999, 476 S.W. 2d 7 (1972). Former statutory law achieves the same result, though rather inartfully, by providing that conviction or acquittal of an offense is a bar to another prosecution for any degree of the offense. Ark. Stat. Ann. § 43-1226 (Repl. 1964). The earlier prosecution constitutes a bar, not because the acquittal or conviction of

the greater offense is an acquittal of the lesser, but because the defendant could have been convicted of the lesser offense at the former trial and hence has previously been placed in jeopardy as to that offense.

Subsection (1)(B) states the general proposition that an acquittal or conviction in a prior prosecution bars a subsequent prosecution for an offense based on the same conduct. This subsection represents the only significant departure in the Code from prior Arkansas law respecting former jeopardy. Its purpose is to prevent the state from carving up a single criminal episode into a number of offenses and subjecting a defendant to a separate prosecution on each. It in no way precludes prosecution or conviction of each of the offenses; it merely forces the state to join the offenses in a single prosecution. Obviously, subsection (1)(B) necessitates liberalization of joinder rules, and the Arkansas Supreme Court has promulgated a rule permitting joinder of any offenses based on the same conduct. See, Ark. R. Crim. P. 21.1, 21.3, requiring joinder of related charges for trial on demand of defendant. By compelling disposition in a single trial of all offenses arising out of the same conduct, subsection (1)(B) and Rule

21.1 prevent harassment of defendants and promote the efficient operation of the criminal justice system.

The general proposition that an acquittal or conviction bars a subsequent prosecution for a different offense based on the same conduct represents an expansive view of double jeopardy protection. Therefore, the basic principle of (1)(B) is qualified by two exceptions. One is where the second offense was not consummated when the first trial began. For example, a prosecution for battery will not bar a subsequent prosecution for homicide if the victim dies after the first trial begins. The second exception is more complex. It applies when the offenses lack complete factual congruence and are aimed at different evils. The exception will typically apply when the offenses are different because two different statutes were contravened by the same conduct. In this situation, a prosecution will be barred by a previous prosecution for the same conduct unless the state was required to prove a different fact in each prosecution and the statutes were directed at different evils. In a recent case where this situation arose the Supreme Court reached the result dictated by § 5-1-113(1)(B)(i). See, *Decker v. State*, 251 Ark. 28, 471 S.W.2d 343 (1971) (conviction of drawing deadly weapon on officer does not bar subsequent prosecution for robbery); see, also, *Ruble v. State*, 51 Ark. 170, 10 S.W. 262 (1888) (conviction of selling liquor without license does not bar subsequent prosecution for selling liquor to minor); *Sparks v. State*, 88 Ark. 520, 114 S.W. 1183 (1908) (conviction of gambling does not bar subsequent prosecution for gambling with minor). The exception of § 5-1-113(1)(B)(i) will seldom apply when defendant violates only one statute but commits two offenses because he injures two persons. In this situation, the law defining each of the offenses is, by definition, directed at the same evil. Thus, the proposed subsection bars two prosecutions for homicides growing out of the same act. This changes current law, which allows separate prosecutions for the killing of each person. See, *Holder v. Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949). As explained above, nothing in this section will preclude separate convictions for each death, but if the state wants more than one conviction it must join all homicides arising out of the same conduct

in a single prosecution. If a defendant commits two offenses because he violates the same statute with respect to the same person by two distinct acts, the exception of § 5-1-113(1)(B)(i) will likewise be inapplicable under most circumstances since the offenses are necessarily aimed at the same evil. Thus, the person who commits the offense of rape twice during the same criminal episode cannot be subjected to two prosecutions. However, if the two offenses were so chronologically disconnected as to not be based on the same criminal conduct, then a prosecution for one will not bar a subsequent prosecution for the other. For example, the person who commits carnal abuse on the same child on two unrelated occasions can be subjected to two prosecutions.

Subsection (2) codifies the United States Supreme Court opinion in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), which held that the civil law concept of collateral estoppel is embodied in the Fifth Amendment guaranty against double jeopardy. According to the Court, "collateral estoppel" means "that when an issue of ultimate fact has once been determined by a final and valid judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475. See, also, *Turner v. Arkansas*, 407 U.S. 366, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972) (acquittal of felony-murder barred subsequent prosecution for felony).

Subsection (3) provides that an improper termination of a prosecution, as defined in § 5-1-112, bars only subsequent prosecutions for offenses of which the defendant could have been convicted at the first trial had it not been improperly terminated. The Model Penal Code Commentary notes that:

"The protection thus afforded a defendant is narrower than that following an acquittal or conviction at the first trial. . . . Improper termination results, almost without exception, from erroneous but good faith rulings by the trial judge. Under those circumstances, giving the defendant immunity from the burden of subsequent prosecution for the same offense, or one of which he might have been convicted, is warranted. To go further and grant him immunity for any offense arising out of his conduct seems disproportionate."

tionate to the trouble which has been caused him." *M.P.C. § 1.09, Comment at 59 (Tent. Draft No. 5, 1956).*

1988 Supplementary Commentary to § 5-1-113

In *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977), the defendant argued that his prior conviction of a burglary committed in one county barred a subsequent conviction in another county for receiving property stolen during the burglary. The Court of Appeals concluded that § 5-1-113(1) (B) did not bar the second conviction since (1) burglary and theft by receiving require proof of different facts; and (2) the law defining each offense is intended to prevent substantially different evils.

Collateral Estoppel: Mitigating Factor Finding Not Bar at Second Trial on Remand After Reversal

A unique problem involving the collateral estoppel doctrine codified in § 5-1-113(2) was raised by the defendant in *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980). The defendant was initially tried and convicted of capital murder and sentenced to life imprisonment without parole. During the penalty portion of the bifurcated capital murder trial, the jury specifically found that the murder was committed by an accomplice rather than by the defendant during the commission of a robbery. On appeal the Supreme Court found the evidence was insufficient to support the determination that the murder occurred during a robbery and remanded the case for a new trial. *Bly v. State*, 263 Ark. 138, 562 S.W.2d 605 (1978). The retrial resulted in a conviction of murder in the first degree, and on appeal the defendant argued that the determination in the penalty phase of his first trial that he did not commit the murder barred his conviction for murder in the second trial. The Supreme Court disagreed and held that the finding by the jury in the first trial had "no bearing on the issue of guilt or innocence of the appellant." 267 Ark. at 622, 593 S.W.2d at 455.

Municipal Court Misdemeanor Conviction Not Bar to Subsequent Felony Prosecution

In *Bailey v. State*, 284 Ark. 379, 682 S.W.2d 734 (1985) the defendant was

charged with battery in the first degree, a class D felony. At a preliminary hearing in municipal court he was convicted of the lesser included offense of battery in the third degree (a misdemeanor), fined, and given a probated sentence. He was subsequently convicted in circuit court of battery in the first degree. He received an eight year prison term. On appeal he argued that the second trial and conviction violated the double jeopardy provision of Article 2, § 8 of the Arkansas Constitution. Section 5-1-113 was discussed neither by the parties nor the Court. The Court affirmed the conviction, apparently holding that, because the municipal court lacked jurisdiction to convict of a felony, the defendant was not twice placed in jeopardy with regard to the felony offense of which he was convicted.

The circumstances of this prosecution are covered by § 5-1-113(1)(B)(i). First and third degree battery require proof of different facts. Hence, were the case to be decided with reference to § 5-1-113(1)(B)(i), it would turn on whether the law defining first degree battery is "intended to prevent a substantially different harm or evil" than that defining third degree battery. Though there is certainly room for argument, it would appear that both offenses are intended to prevent harms of the same nature, if not degree. Accordingly, had *Bailey* been decided under § 5-1-113 the case might well have gone the other way.

Successive Trials: No Res Judicata Effect of Jury Verdict on Firearm in First Trial

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that he had not used a firearm precluded State's witnesses from testifying that he was armed in the second trial, even though no enhancement under § 5-4-505 was sought at the latter trial. The Court agreed with appellant that he could not be tried again for using a firearm, but it found that the trial court had not committed error by permitting witnesses to testify that appellant had a firearm. The court opined as follows:

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or as to which there has been a *dismissal*, since the prior acquittal or dismissal indicates only that the prosecution did not prove the underlying facts beyond a reasonable doubt, a higher standard than is ordinarily required for the introduction of other crimes evidence. However, a number of courts have, somewhat illogically, extended the doctrine of collateral estoppel to this area, holding that an acquittal bars the prosecution from using evidence of that offense as other crimes evidence at a subsequent trial. (Emphasis added.)

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Original Commentary to § 5-1-114

Both the United States and Arkansas Supreme Courts have ruled that the constitutional prohibition on double jeopardy does not apply to prosecutions by different sovereigns. *United States v. Lanza*, 260 U.S. 377, 43 S. Ct. 141, 67 L. Ed. 314 (1922); *Guyot v. State*, 222 Ark. 275, 258 S.W. 2d 569 (1953) (dictum). However, a growing number of states, including Arkansas, have by statute given double jeopardy effect to previous prosecutions by the United States or another state or territory thereof. See previous authority found at Ark. Stat. Ann. § 43-1224.1 et seq. (Supp. 1973).

Subsection (1), applicable to previous prosecutions in other jurisdictions for the same conduct, parallels subsection (1) of the previous section. Its prior counterparts were Ark. Stat. Ann. §§ 43-1224.1,

1224.2 (Supp. 1973). The Code provision was adopted because it was stylistically consistent with § 5-1-113(1). The substantive coverage of this subsection closely approximates that of the old statute.

Subsection (2) gives collateral estoppel effect to prosecutions in other jurisdictions. This is not required by *Ashe v. Swenson*, *supra*, since Arkansas was not a party to the previous proceeding. However, the notions of fairness and finality that underlie *Ashe v. Swenson* dictate a similar result here.

The Commission decided not to give double jeopardy effect to an improper termination of a prosecution in another jurisdiction. There is a wide diversity of opinion on when jeopardy attaches and what reasons justify termination. When a judge

in another jurisdiction terminates a prosecution, he does so with a view toward the possible effect of termination on future prosecutions in that jurisdiction. Since he

does not consider the possible effect of the termination on an Arkansas prosecution, this state would often be prejudiced if bound by his decision.

1988 Supplementary Commentary to § 5-1-114

In *Journey v. State*, 257 Ark. 1007, 521 S.W.2d 210, *cert. denied*, 423 U.S. 866 (1975), which was decided before the enactment of the Code, the defendant contended that his acquittal in federal district court on a charge of transporting stolen merchandise in interstate commerce barred a subsequent conviction in state court for possessing the same stolen merchandise. The elements of the federal offense were (1) transporting or causing to be transported stolen property (2) with a value in excess of \$5,000 (3) which the defendant knew had been stolen. The Court applied former §§ 43-1224.1 and 43-1224.2 (Supp. 1973) and concluded that the subsequent prosecution was not barred since the federal offense required proof of elements that were not essential to a state prosecution for possession of stolen property. After the enactment of the Code, the defendant again appealed to the Supreme Court contending that § 5-1-114 had expanded the former statutory protection against double jeopardy. *Journey v. State*, 261 Ark. 259, 547 S.W.2d 433 (1977). Relying on the statement in the original commentary to the effect that the coverage of subsection (1) of § 5-1-114 “closely approximates that of the old statute,” the Court concluded that its decision in the earlier case was controlling with respect to the defendant’s arguments based on subsection (1). Under subsection (2) of § 5-1-114 the defendant argued that an essential element of the state offense—possession of the stolen merchandise with knowledge that it was stolen—was necessarily found not to exist in the federal trial. The Supreme Court disagreed since it is possible to cause stolen goods to be transported in interstate commerce without possessing them. Although the result is correct, the Court’s reason is somewhat confusing. It would seem far simpler to hold that acquittal of the federal charge did not require a determination inconsistent with a fact that must be established to convict of the state charge since the

acquittal could have been based on a determination that the stolen goods were not transported in interstate commerce or that their value was less than \$5,000.

Bateman v. State, 265 Ark. 307, 578 S.W.2d 216 (1979) was somewhat similar to *Journey*. In *Bateman* the defendant was initially convicted in federal court of transporting stolen firearms in interstate commerce and was subsequently convicted in state court of theft by receiving of the same firearms. The only essential difference between the two offenses was that the federal offense required proof that the stolen firearms were transported in interstate commerce. The Supreme Court concluded that the state conviction was barred by § 5-1-114(1) since the state offense did not require proof of any *new* fact and the two offenses were aimed at the same evil—the traffic in stolen property. It rejected the state’s argument that the value of the stolen firearm was a new fact required to be proved for the state conviction since value goes only to punishment, not to the definition of the offense. The Court distinguished the *Journey* decisions on the grounds that in *Journey* the federal prosecution resulted in an acquittal rather than a conviction. This last conclusion is puzzling since when § 5-1-114(1) applies, it bars a subsequent prosecution whether the first prosecution resulted in a conviction or an acquittal. If it is possible to distinguish *Journey* from *Bateman*, it may be because the federal offense at issue in *Journey* was defined so as to include “causing” stolen goods to be transported in interstate commerce whereas the federal offense in *Bateman* required the actual transportation of stolen firearms in interstate commerce. In both *Journey* decisions the court observed that it was possible to “cause” stolen goods to be transported without ever “possessing” the stolen goods. If this is so, then the state offense requires proof of a new fact—i.e., possession of stolen goods—not required to convict of the federal offense.

Original Commentary to § 5-1-115

Section 5-1-115 qualifies the former jeopardy defenses provided by the three preceding sections.

Subsection (1) denies former jeopardy effect to a prosecution before a court lacking jurisdiction. *Cf.*, *Rector v. State*, 6 Ark. 187 (1845).

Subsection (2) is aimed at collusive or fraudulent prosecutions. With the decline of justice of the peace courts, the practice of appearing before a justice of the peace and pleading guilty to a minor charge in an effort to preclude future prosecution is no longer common. However, the potential for such abuse of the judicial process remains so long as subordinate criminal courts exist. The Code addresses the problem by refusing to recognize a prosecution that was (1) procured by a defendant, (2) without the knowledge of the prosecutor or victim, and (3) with the purpose of

avoiding a more severe sentence. Previous cases have focused on the presence of collusion and the intent to elude future prosecution. See, e.g., *Richards v. State*, 108 Ark. 87, 157 S.W. 141 (1913). Since determining whether collusion occurred is often difficult, the Code formulation adopts a more objective standard by requiring knowledge of the prosecutor or victim.

Subsection (3) may be unnecessary since in each of the preceding three sections the term "judgment" is qualified by the phrase "that has not been set aside, reversed, or vacated." The provision has been included to make it clear that a successful collateral attack on a judgment has the same effect as the successful direct attack — the judgment no longer constitutes a basis for a claim of former jeopardy.

1988 Supplementary Commentary to § 5-1-116

The General Assembly has been singularly dissatisfied with this section. Since its enactment in 1975, it has been amended in 1979, 1981, 1983, and 1987.

As originally enacted, subsection (a) gave the juvenile court exclusive jurisdiction over all persons under 15 years of age at the time of their alleged criminal conduct. Whatever the offense, the idea of 12, 13, and 14 year olds being thrown into the Arkansas prison system was not acceptable.

If the person was 15, 16, or 17 at the time of the alleged act, the prosecuting attorney had discretion to charge the person as an adult or as a juvenile. Even though the defendant was charged as an adult, the circuit or municipal court could overrule the prosecutor and transfer proceedings to juvenile court. If the defendant's age became an issue in a proceeding, subsection (b) provided that the burden was on the defendant to establish that his age made him eligible for a transfer to juvenile court. The final subsection excluded from the section's ambit prosecution for violations of traffic offenses.

The present status of the section is as follows: The juvenile court has exclusive jurisdiction over persons who were under age 15 at the time of the alleged offense

except 14 year olds alleged to have committed first degree murder, second degree murder, or rape. Persons who were 15, 16, or 17 at the time of the alleged offense, and 14 year olds alleged to have committed first degree murder, second degree murder, or rape, may be charged either as juveniles or as adults in the discretion of the prosecution. See *Sargent v. Cole*, 269 Ark. 121, 598 S.W.2d 749 (1980). If charged as an adult, the circuit or municipal court in which the offense is charged may transfer proceedings to juvenile court.

This section should be read in conjunction with § 9-27-316, which requires all persons under age 18 who are arrested *without a warrant* to be taken immediately before the juvenile court. The juvenile court then notifies the prosecutor who makes the decision whether to charge the person in juvenile court or in another court with jurisdiction over the matter.

Discretionary Transfers of Jurisdiction

Section 5-1-116 was amended by Act 14 of 1987 after the Arkansas Supreme Court held unconstitutional legislation investing county courts with exclusive original jurisdiction over juvenile matters. *Walker v. Arkansas Department of Human Services*, 291 Ark. 43, 722 S.W.2d 558 (1987).

Act 14 of 1987 transferred jurisdiction of the juvenile court to the juvenile division of the circuit court and made conforming amendments to the language of § 5-1-116.

Factors that must be considered by the circuit court in exercising its discretion on

whether criminal proceedings should be transferred to the juvenile division are set out in Ark. Code Ann. § 9-27-324 (1987). See *Ashing v. State*, 288 Ark. 75, 702 S.W.2d 20 (1986) and *Evans v. State*, 287 Ark. 136, 697 S.W.2d 879 (1985).

Original Commentary to § 5-2-201

Section 5-2-201 defines terms essential to an understanding of the principles governing criminal liability. Subsection (1) addresses the most obvious source of criminal liability by providing the term “act” with a broad definition encompassing speech and possession of property. Inclusion of “speech” in the definition of “act” is necessary because several offenses are defined in terms of speech. See, e.g., § 5-71-209 (Harassing communications); § 5-71-210 (Communicating a false alarm); and § 5-71-211 (Threatening a fire or bombing). See, also, Vern. Texas Code Ann. § 1.07(a)(1) (Repl. 1974). Additionally, criminal liability attaches to possession of property by persons having certain mental states. See, e.g., § 5-36-106 (Theft by

receiving); § 5-36-108 (Unauthorized use of a vehicle); and § 5-37-212 (Unlawfully using slugs).

Subsection (2) provides a foundation for assessing criminal penalties for inaction in the face of a duty to act. For example, see § 5-36-105 (Theft of property lost, mislaid, or delivered by mistake); and § 5-26-401 (Nonsupport).

As is the case in most new codes, “conduct” is defined so as to embrace both an act and an attendant mental state. See, e.g., M.P.C. § 1.13(5); Vern. Texas Code Ann. § 1.07(a)(8) (Repl. 1974); Proposed Michigan Code § 301(d) (1967).

The definition of the verb form of “act” re-emphasizes the notion of liability for an omission.

Original Commentary to § 5-2-202

Section 5-2-202 promotes specificity and lucidity throughout the Code by defining the four culpable mental states utilized to define Code offenses. It is aligned conceptually with M.P.C. § 2.02 and in terminology with Proposed Michigan Code § 305, Proposed Oregon Code § 7, and Proposed Kentucky Code § 205. It essays “the extremely difficult task of articulating the general mens rea requirements for the establishment of liability.

“The approach is based upon the view that clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime; and that, as indicated in section 1.14, the concept of material element include the facts that negative defenses on the merits as well as the facts included in the definition of the crime.

“The reason for this treatment is best stated by suggesting an example. Given a charge of murder, the prosecution normally must prove intent to kill (or at least to cause serious bodily injury) to establish

the required culpability with respect that element of the crime that involves the result of the defendant’s conduct. But if self-defense is claimed as a defense, it is enough to show that the defendant’s belief in the necessity of his conduct to save himself did not rest upon reasonable grounds. As to the first element, in short, purpose or knowledge is required; as to the second negligence appears to be sufficient. Failure to face the question separately with respect to each of these ingredients of the offense results in obvious confusion.” *M.P.C. § 2.02, Comment at 123, 124 (Tent. Draft No. 4, 1955)*. See also, *Commentary to §§ 41-110, 115(5), supra*.

Arkansas statutes previously expressed culpable mental states in diverse fashions — in terms,¹ for example, of “evil design” (formerly at § 41-116); “culpable negligence” (formerly at § 41-116); “full knowledge” (formerly at § 41-120); “willful” conduct (formerly at § 41-205); “knowing” conduct (formerly at § 41-302); “fraudulent” conduct (formerly at § 41-1804); “malicious” conduct generally (formerly at

§ 41-403); “express malice” in homicide prosecutions (formerly at § 41-2203); “implied malice” in homicide prosecutions (formerly at § 41-2204); “deliberate” conduct (formerly at § 41-2205); “premeditated” conduct (formerly at § 41-2205); “wanton” conduct (formerly at § 41-405); “cruel” conduct (formerly at § 41-409); and conduct “with malice aforethought” (formerly at § 41-606). Even the most cursory perusal of prior authority discloses that it followed no pattern or rationale with respect to definitions of culpable mental states. Considerable elasticity was displayed in defining and using these terms. For instance, malice meant one thing under authority previously codified as Ark. Stat. Ann. § 41-403 (Repl. 1964) (Administering poison to animals); it meant something quite different in the context of a homicide prosecution. See prior law earlier codified as Ark. Stat. Ann. §§ 41-2203, 41-2204 (Repl. 1964). Section 5-2-202 changes Arkansas law respecting mens rea only in that it no longer gives currency to nebulous terms such as those previously enumerated.

The Code recognizes four distinct culpable mental states: a person may act purposely, knowingly, recklessly, or negligently. These culpable mental states, taken in conjunction with the three possible constituents of an offense — i.e., conduct, attendant circumstances, and result — serve to define each Code offense. In other words, under the Code, every offense is defined so as to require that a person act either purposely, knowingly, recklessly, or negligently with respect to conduct, attendant circumstances, and/or the result of conduct.

Section 5-2-203(1) defines a “purposeful” culpable mental state in terms of a consciously entertained objective to engage in conduct or cause a result. “Knowing” conduct, as defined by § 5-2-203(2), involves awareness of (1) the nature of the conduct in question, (2) any relevant attendant circumstances, and (3) the virtual certainty that a particular result will attend the conduct. An object to engage in conduct or an awareness of the nature of conduct does not mean that the actor must know that the conduct is illegal.

The distinction between knowing and purposeful conduct is a fine, and sometimes elusive, one. See, e.g., *Sewell v. United States*, 406 F.2d 1289 (8th Cir.

1969), equating knowing conduct with both intentional and voluntary conduct. *Id.* at 1293, n. 3. The distinction will come into play only with respect to a limited number of circumstances, but in those situations it is important to distinguish conduct designed to achieve a result from that engaged in with knowledge that a result will occur, but without a purpose to cause the result. Illustrative of such a situation is the following hypothetical one:

A crime has been committed and the prosecution intends to offer as evidence an antique firearm to which A has access. A knows of the prosecutor’s intent. A is also a collector of antique guns and needs this one to complete a set. A is unable to resist the temptation and takes the gun, knowing the effect his conduct will have on the availability of this evidence at trial, but being indifferent to the success of the prosecution. Although A has committed theft, he is not guilty of an offense under § 5-53-111 (Tampering with physical evidence) which prohibits “removal” of evidence with the purpose of impairing its availability in an official proceeding. This is so because it was not A’s conscious object to cause the gun’s unavailability, even though he knew his conduct would have this result.

Subsection (3) defines “recklessness.” While both “reckless” and “knowing” conduct involve “aware” actors, “recklessness” is defined in terms of risk creation, specifically, an awareness of a “substantial and unjustifiable” risk that certain attendant circumstances exist or that prohibited consequences will occur. The language of the provision closely tracks that of M.P.C. § 2.02(2)(c). See, also, Vern. Texas Code Ann. § 6.03(c) (Repl. 1974), and Proposed Massachusetts Code § 16(d).

“Negligent” conduct is defined by subsection (4). It is distinguished from “reckless” conduct primarily in that it does not involve conscious disregard of a perceived risk. An actor charged with negligent conduct — for example, negligent homicide (§ 5-10-105) — is assumed to have been unaware of the existence of the risk. Under the definition, the fact finder must determine whether the actor should have been aware of a risk. The nature and degree of the risk itself are the same for both culpable mental states. The section is generally in accord with prior Arkansas

law. See, e.g., *Phillips v. State*, 204 Ark. 205, 161 S.W.2d 747 (1942).

¹ All citations are to 1964 replacement volume.

1988 Supplementary Commentary to § 5-2-202

Purposeful Mental State

In *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979), the Arkansas Supreme Court observed that “purpose” is the functional equivalent of the former notion of specific intent. 267 Ark. at 12-13, 588 S.W.2d at 438. The Court went on to say that the finder of fact could infer purpose from the surrounding circumstances in the same way that specific intent could formerly be inferred. The Court concluded that there was “no sound reason why the kind of evidence or quantum of proof to show a ‘a conscious object’ should be different from that required to show specific intent.” 267 Ark. at 13, 588 S.W.2d at 438. This is consistent with the original commentary. It should be noted, of course, that the focus is on the defendant’s actual state of mind. As in former specific intent cases, it is not enough to establish that a reasonable person could be found to have intended either to cause a result or to engage in conduct. (§ 5-2-202(1).) Rather, the evidence must lead to the conclusion that the particular defendant actually had as his or her “conscious object” the proscribed result or conduct. In short, the test is not objective but subjective.

Knowingly Causing a Result

In *Johnson v. State*, 270 Ark. 992, 606 S.W.2d 752 (1980) appellant became involved in an altercation with Glass. There were between fifteen and fifty people milling about across the street from the altercation in the general vicinity of two nightclubs. Johnson fired five shots at Glass, one of which killed a bystander who was walking away from the crowd. Appellant was convicted of second degree murder charged under § 5-10-103(a) (2) (knowingly causing death under circumstances manifesting extreme indifference to the value of human life). The Arkansas Supreme Court reversed on the grounds that when appellant fired at Glass he was not “practically certain” (§ 5-2-202(2) that his conduct would cause the death of a bystander. The Court also concluded that,

had appellant been charged under § 5-10-103(a)(1) (with purpose of causing death of one person, he causes death of any person) or § 5-10-103(a)(3) (with purpose of causing serious physical injury to one person, he causes death of any person), his conviction would have been unassailable. The Court’s reasoning is in accord with the statutes involved and the commentary thereto.

In *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984), the Arkansas Court of Appeals has found that “acting under circumstances manifesting extreme indifference to human life” (§ 5-13-201(a)(3)) is equivalent to “knowing” conduct.

Proof of Knowledge Attendant Circumstances

In order to prove an offense under § 5-13-202(a)(4)(C) the State must show that the defendant had actual knowledge of the victim’s age. *Hubbard v. State*, 20 Ark. App. 146, 725 S.W.2d 579 (1987).

Hubbard had been admitted to the Arkansas State Hospital and was being examined by Dr. Lambert, when he began hitting the doctor on the head as he turned to chart some notes. Hubbard was convicted of second degree battery. At trial and on appeal he argued that he did not know that Dr. Lambert was sixty years of age and that Dr. Lambert’s aged appearance was attributable to ill-health. Hubbard was apparently aware of Dr. Lambert’s health problems, as he had been treated by him previously. The court reversed the battery conviction, finding insufficient proof on the mental state issue.

The culpable mental state required by the definition of the offense is “knowingly.” Section 5-2-202(2) defines “knowingly” as follows: “A person acts knowingly with respect to ... the attendant circumstances when he is aware that ... that such circumstances exist.”

The Court interpreted the definition as follows:

We believe the test is whether from the circumstances in the case at bar, appellant, not some other person or persons, knew that his victim was sixty years of age or older. A different result by this court could have been reached had the General Assembly defined "knows to be" in the above statute to include one who has information that would lead an ordinary, prudent person faced with similar information to believe that information is fact.

20 Ark. App. at 148-49, 725 S.W.2d at 580-81.

The court appeared to find that because of Hubbard's familiarity with his victim, a "reasonable man" standard was inapplicable. Presumably, the court has not held that a jury cannot infer knowledge of a defendant from proof of facts that would lead an ordinary, prudent person having similar information to believe in an alleged state of affairs. In the absence of a confession (and sometimes with a confession), the evidence never conclusively demonstrates what is "known" to a defendant. Assumptions about his knowledge are always deduced from his actions and words viewed in light of a presumption that he is sane and competent to draw inferences from attendant circumstances. So, while the prosecution must prove actual knowledge, in all but a few cases it can only do so by showing attendant circumstances and suggesting that the jury draw inferences compelled by them.

Reckless Mental State

According to the Court of Appeals, "recklessness" is not a technical term beyond the understanding of a common person. *Viar v. State*, 269 Ark. 772, 601 S.W.2d 579 (Ct. App. 1980) (affirming conviction of second degree battery). The court noted that "an average individual or juror would ascribe substantially the

same meaning for the word as contained in the statutory definition." *Id.* at 773, 601 S.W.2d at 580. For this reason and because no request for an instruction was made at trial, the Court of Appeals found no error in failing to instruct the jury on the definition of recklessness.

The *Viar* case should not be interpreted to mean that such an instruction is never necessary, however. The Arkansas Supreme Court's per curiam order in *Re: Arkansas Model Criminal Instructions*, 264 Ark. 967 (1979) states: "If Arkansas Model Criminal Instructions (AMCI) contains an instruction applicable in a criminal case, and the trial judge determines that the jury should be instructed on the subject, the AMCI instruction shall be used" *Id.* at 967. AMCI 1602 (Battery in the Second Degree) contains a definition of "recklessness." The *Note on Use* provides, "Definitions should be given when requested by counsel or when the court feels that it would be helpful to the jury."

A number of cases have found substantial evidence to support convictions based upon proof of reckless conduct. One case, however, is particularly helpful in clarifying the distinction between reckless and negligent conduct. In *Smith v. State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981) the court upheld a manslaughter conviction based upon reckless conduct, rejecting appellant's arguments that the proof supported only a finding of negligence. The court noted that the circumstances both before and after the death of the victim demonstrated a "conscious disregard of a perceived risk" and a "knowledgeable but callous" disregard for human life. *Id.* at 228, 623 S.W.2d at 864. This construction is in accord with the original commentary where it is pointed out that recklessness turns on the defendant's awareness of a risk created by his conduct.

Original Commentary to § 5-2-203

Section 5-2-203 provides a guide for construction of Code provisions defining offenses. Each of the four subsections of § 5-2-203 is largely self-explanatory.

Subsection (a) attends to the problem created by an offense defined in a way making it unclear whether a particular culpable mental state applies to all of the

elements of the offense or merely some of them. Subsection (a) is derived from M.P.C. § 2.02(4) and applies any specified culpable mental state to all the elements of the offense where a contrary legislative intent does not clearly appear.

Subsection (b) complements § 5-2-204(b). The latter requires that, with a

few exceptions, a person is criminally liable only if he acts with a culpable mental state with respect to all elements of the particular offense. Section 5-2-203(b) provides that when a statute fails to specify a culpable mental state, § 5-2-204(b) is satisfied by proof that the person acted at least recklessly. Consequently, the subsection "accepts as the basic norm what usually is regarded as the common law position. . . . Most importantly, it represents the most convenient norm for drafting purposes, since when purpose or knowledge is to be required, it is normal to so state; and negligence ought to be viewed as an exceptional basis of liability." *M.P.C. § 2.02, Comment at 127 (Tent. Draft No. 4, 1955)*.

The generic sense of "culpable mental state" is intended: it refers to mens rea requirements of statutes outside the Code as well as to those of the Code. In other words, even though "willful" is not a Code culpable mental state, a statute outside the Code prohibiting "willful" conduct is not one without a "culpable mental state" for the purposes of § 5-2-203(b).

Subsection (c) simply supplies a method for assessing sufficiency of proof based on the obvious proposition that a lesser culpable mental state is necessarily established by proving a greater one. So, if an offense is defined in terms of knowing conduct, proof of purposeful conduct suffices, and so on.

Subsection (d) restates the traditional rule that knowledge of the existence, meaning, or application of the statute defining an offense is not itself an element of that offense.

The Model Penal Code offers the following elucidation:

"It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for

example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve matter of law as well as fact. But insofar as this point is involved, there is no need to state a specific principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability by [§§ 5-2-202, -203]. The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense. If, on the other hand, no legal element is involved in the material attendant circumstances, there is no basis for contending that ignorance of such element has a defensive import; it is simply immaterial.

"The paragraph recognizes, however, that there may be special cases where knowledge of the law defining the offense should be an element of the offense, i.e., where only conscious violation of the law, in the sense of an awareness that one's conduct is a violation, should be brought within the scope of prohibition, or where a belief based on reasonable grounds that one's conduct is not a violation of the law ought to engender a defense. Such a result may be brought about directly by the formulation of the definition of the crime, e.g., explicitly requiring awareness of a regulation, violation of which is denominated an offense. It also may be brought about by a general provision of the Code, as in the special circumstances dealt with by [§ 5-2-206]. In either case, the result is exceptional and arises only when the governing law 'plainly so provides.'" *M.P.C. § 2.02, Comment at 131 (Tent. Draft No. 4, 1955)*.

Original Commentary to § 5-2-204

Section 5-2-204 sets out a concept resting at the heart of any workable, coherent criminal code: as a minimum requirement, a voluntary act or omission is an essential ingredient of an offense. This requirement may be one of constitutional

dimension. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). The Model Penal Code Reporter elaborates as follows on this fundamental aspect of the Code:

"The law can not hope to deter involun-

tary movement or to stimulate action that can not physically be performed; the sense of personal security would be short-lived in a society where such movement or inactivity could lead to formal social condemnation of the sort that a conviction necessarily entails. People whose involuntary movements threaten harm to others may present a public health or safety problem, calling for therapy or even for custodial commitments; they do not present a problem of correction. *M.P.C. § 2.01, Comment at 119 (Tent. Draft No. 4, 1955).*"

The Commission did not endeavor to define "voluntary act" for reasons exemplified by the following passage from Volume I of the *Working Papers of the National Commission on Reform of Federal Criminal Laws (1970)* (hereinafter *Working Papers*):

"Subdivision (d),* which attempts to formulate the crucial issue, is simply inaccurate, unless one uses the guide to interpretation afforded by the examples. It is easy to think of 'voluntary' conduct which is not in the ordinary sense the product of conscious or habitual effort or determination. The commentary notes that the definition corresponds to the reference in section 2 of the *Restatement of Torts (Second)* (1965) to an 'external manifestation of the actor's will.' The notion of 'willing' without 'trying' or 'making an effort' or 'determining' to do something is what is at stake here, but one can 'feel' what is intended more easily than one can state it....

"Two purposes might be served by a definition of voluntariness in this section of the Code. The definition might give content to the main provision of Section [202(1)], which would then reflect more precisely the basic principle of liability. ... The definition might also help to resolve a jury's confusion in a case involving the question of voluntariness. For the reasons given above, it is unlikely that either of these purposes would in fact be served. Conceptually, the concept of voluntariness is probably primitive. To the extent that examples provide helpful illustrations, it seems preferable to leave the definition of 'voluntariness', 'open' and allow the cases to develop concrete illustrations, supported by full descriptions of particular facts." *Id.* at 111-13.

It should be noted that the term "con-

duct" in subsection (a) is modified by language making it clear that conduct need only *include* a voluntary act in order to give rise to criminal liability. For instance, where a death is caused by negligent operation of an automobile by an intoxicated person, it is no defense to a charge of negligent homicide that the driver was unconscious when the fatal injury was inflicted.

Subsection (b) makes criminal liability contingent upon action coupled with a culpable mental state respecting any element of an offense demanding such proof. In so doing it comports with well established Arkansas law. See, *Yoes v. State*, 9 Ark. 43, 44 (1848):

"A crime or misdemeanor consists in a violation of public law, in the commission of which there must be a union or joint operation of act and intention or criminal negligence." *Cf., Robinson v. California, supra.*

Under subsection (c)(1), unless the statute defining the offense provides otherwise, the state is not required to prove a culpable mental state in a prosecution for a "violation," a petty offense punishable by fine only. See, §§ 5-1-105, -108.

All Code offenses except violations require proof of a culpable mental state. Subsection (c)(2) is necessary if this requirement is to be relaxed with regard to previously and subsequently enacted statutes defining strict liability crimes. No such offenses appear in the Code, but the Commission was unwilling to foreclose future enactment of such legislation under appropriate circumstances or draw into question the continuing validity of existing authority of this nature. See, e.g., Ark. Stat. Ann. § 3-3-201 (unknowingly furnishing to minor).

See AMCI 4002.

*M.P.C. ... § 2.01(2)(d):

"(2) The following are not voluntary acts within the meaning of this section:

"(a) a reflex or convulsion;

"(b) a bodily movement during unconsciousness or sleep;

"(c) conduct during hypnosis or resulting from hypnotic suggestion;

"(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."

Original Commentary to § 5-2-205

This section comes to grips with problems associated with the causal relationship between conduct and results. These are singularly complex and, of course, extend in scope beyond the criminal law. The section supplies a “but for” test, modified to the extent that a sufficient concur-

rent cause does not exculpate unless the actor’s conduct was clearly insufficient to produce the result occasioning the prosecution. The test is congruent with former law. See, *McClung v. State*, 217 Ark. 291, 230 S.W.2d 34 (1950).

See AMCI 4003.

Original Commentary to § 5-2-206

Section 5-2-206 is drawn from Proposed Michigan Code § 325; M.P.C. § 2.04; and Proposed Kentucky Code § 230. Subsection (a) codifies what is believed to be the prevailing view as to the relevance of mistake of fact. As a matter of definition, of course, a mistaken belief of fact precludes conviction when the mistake negates the culpable mental state required to establish the offense. For example, one who leaves a restaurant taking a coat that he mistakes for his own cannot be convicted of theft since his mistake of fact negates the requisite intent to deprive the true owner of the coat. The assertion of such a mistaken belief is not, strictly speaking, a “defense,” since it merely focuses on the state’s failure to prove all elements of the offense charged, not on an “excuse” or “justification.” See, § 5-1-111(c) defining a “defense.” As a result, the Code does not contain a provision, common to many new codes, to the effect that a mistaken belief of fact exculpates when it “negatives the culpable mental state required for the commission of the offense.” See, Proposed Michigan Code § 325(1)(a).

Under subsection (a)(1), a mistaken belief of fact not negating a culpable mental state nonetheless exculpates where the statute defining the offense so provides. No requirement of “reasonableness” is imposed. The reasonableness of the actor’s belief is irrelevant so long as he actually entertained the belief claimed.

Subchapter 6 describes a number of circumstances in which a person is justified in engaging in conduct that would otherwise be criminal. Subsection (a)(2) recognizes that a mistaken belief as to whether such circumstances exist does not foreclose the defense of justification. Such belief must, of course, be reasonable; and subchapter 6 so provides by qualify-

ing the verb “believes” with the adverb “reasonably” each time the former appears. Thus, the individual who kills another person in the reasonable, but mistaken, belief that the other person is about to kill him has a defense to a homicide charge.

Subsection (b) states the fundamental proposition *ignorantia juris non excusat*. Subsection (c) carves out a carefully circumscribed exception to this general proposition. In so doing, it heeds the admonition of *State v. Paup*, 13 Ark. 129 (1852), that any “. . . departure from (the general rule), under any circumstances, should be distinctly marked, and so guarded as to leave the general rule unimpaired.” *Id.* at 135. Generally speaking, subsection (c) establishes as an affirmative defense that the conduct alleged was undertaken in reasonable reliance upon the types of official statements of law enumerated in subsections (c)(1)-(3). As mentioned in the *Commentary to § 325 of the Proposed Michigan Code* (1967):

“[I]t hardly seems fair to penalize a citizen because he relies on an official pronouncement or ruling, at least by an employee or agency whose task it is to interpret and apply the provision in question, only to find that a court at a later time places some other interpretation on the language. Subsection (3)(c) embodies the judgment that the citizen should not be so penalized, particularly when administrative rulings are as pervasive as they are today.” *Id.* at 40.

This apparently relaxes prior Arkansas authority on the subject. See, *Lindquist v. State*, 213 Ark. 903, 213 S.W.2d 895 (1948), where the Supreme Court held that a reasonable belief, based on the opinions of several attorneys general, as to the law’s requirements will not excuse commission of a crime. The response to

appellants' arguments as to excuse was simply, "[C]ourts have no such power. . . ." *Id.* at 905, 906, 213 S.W.2d at 896.

Subsection (d), while acknowledging the possibility of acquittal based on mistake of fact, makes it clear that if there is a lesser included offense of which the defendant, despite his mistake, is guilty, he does not escape liability entirely. The Code authorizes conviction of the included offense of which he would have been guilty had the situation been as he supposed.

Subsection (e) provides that mistake of law is a defense under certain circum-

stances — for example, where a person takes property of another under the mistaken belief that it has passed to him by intestate succession. This subsection is ". . . intended to guide the trial court in deciding issues of relevancy of evidence, and [does] not affect burden of proof or persuasion as such. The burden remains on the state to plead the appropriate element of culpability set out in the statute under which the information is drawn and to prove its existence beyond a reasonable doubt." *Commentary to Proposed Michigan Code § 325* at 40.

1988 Supplementary Commentary to § 5-2-206

What Constitutes Official Statement of Law

In *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984), the defendant was convicted of an offense under § 5-73-103 (possession of firearms by certain persons prohibited) upon proof that he possessed a firearm and had received a suspended sentence in 1971 after pleading guilty to a felony charge of assault with intent to kill. Under § 5-73-103 a prior suspended sentence is a "conviction." The defendant argued on appeal that the 1971 trial judge and his attorney advised him in 1971 that, under the law as it then existed, *State Medical Board v. Rodgers*, 190 Ark. 266, 79 S.W.2d 83 (1935), he was not a convicted felon. He went on to contend that he was entitled to an instruction under § 5-2-206(c)(2) stating that he had acted in reliance upon "an official statement of the law" set out in the latest decision of the state's highest appellate court. The Supreme Court affirmed the trial court's refusal to give this instruction, pointing out that "our decision in *Rodgers* was not an official ruling that under an entirely different statute (i.e., § 5-73-103) a plea of guilty resulting in a suspended sentence could not constitute a 'conviction.'" *Id.* at 149, 666 S.W.2d at 703. Thus, one who reasonably relies on an official statement of general application in a judicial decision does so at his peril unless he keeps abreast of exceptions imposed by statute.

See AMCI 4004.

Mistake of Law as Defense

In *Simms v. State*, 12 Ark. App. 254, 675

S.W.2d 643 (1984) the defendant was convicted of a class D felony under § 41-2411 for taking her minor child to Arizona. Since repealed, § 41-2411 at that time required the State to prove that the defendant *knew* "That he had no lawful right to do" certain things alleged to have been done. She had separated from her husband, and a decree had been entered awarding joint custody of the child. She resumed living with her husband but decided that the relationship would not work. She then consulted an attorney who, according to her testimony, advised her that resumption of cohabitation nullified the custody order previously entered. She thereupon moved with the child to Arizona.

At trial the defendant argued that she lacked the culpable mental state required by § 41-2411 because the legal advice she received led her to believe that her actions were lawful. Neither the trial court nor the Court of Appeals treated this issue as one governed by § 5-2-206(e).

If the trial court believed that the defendant actually obtained and relied upon legal advice, it should have ruled that the State had not proved the culpable mental state element of § 41-2411, which requires the State to prove that the defendant *knew* "that he had no lawful right to do" the acts alleged. Indeed, defenses under § 5-2-206(e) may *only* be asserted in prosecutions under statutes such as § 41-2411 which require that the State prove actual knowledge of the laws as an element of the offense. Compare § 5-2-206(b)-(c) with § 5-2-206(e).

1988 Supplementary Commentary to § 5-2-207

Voluntary Intoxication Defense Abolished

As promised in *Mosier v. State*, the Court reexamined the voluntary intoxication defense. It held that voluntary intoxication is no longer available as a defense in criminal prosecutions, overruling all previous authority to the contrary. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986). The Court found that the Arkansas General Assembly intended to abrogate the defense entirely by enacting Act 101 of 1977. It concluded that *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978)

and cases following it, finding that the 1977 statute had the effect of reinstating prior Arkansas common law, were erroneously decided.

The practical and constitutional questions raised by the *White* decision are discussed in *Note, Criminal Law — Defense of Voluntary Intoxication No Longer Available to Prove Intent*, 9 UALR Law Journal 657 (1986-87).

The original and supplementary commentaries appearing below trace the history of this provision.

Original Commentary to § 5-2-207

As amended by Act 101 of 1977, § 41-207 offers the affirmative defense of intoxication only where intoxication is not "self-induced." This amended version not only reverses the original Code position on this defense but also may overrule 100 years of Arkansas case law. See, e.g., *Wood v. State*, 34 Ark. 341 (1879). The cases, interestingly enough, provide a common law defense that co-existed with a narrowly drawn statute which on its face seemed to preclude the defense. See prior law formerly codified as Ark. Stat. Ann. § 41-115 (Repl. 1964):

"Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense. . . ."

Whether the Arkansas Supreme Court will continue to permit introduction of evidence of intoxication to negate the existence of specific intent remains to be seen.

1988 Supplementary Commentary to § 5-2-207

See 1988 Supplementary Commentary.

Before enactment of the Code, self-induced intoxication could be interposed as a defense only to show that the accused could not have formed specific intent. See original commentary.

As originally enacted, this section made *self-induced* intoxication an *affirmative defense* to the extent that it negated the existence of a purposeful or *knowing* mental state. Act 101 of 1977 eliminated this statutory affirmative defense. In *Varnedare v. State*, 264 Ark. 596, 573 S.W.2d 57 (1978), the Court held that "(b)y amending § 41-207 to remove self-induced intoxication as a statutory *defense* (sic), the legislature, in effect, reinstated any prior Arkansas common law on the subject." *Id.* at 598, 573 S.W.2d at 59. As pointed out by the commentary to § 41-207, evidence of intoxication had long been admissible as a common law defense

to negate specific intent, and the *Varnedare* Court went on to so indicate. Thus, by eliminating the *affirmative defense* of self-induced intoxication, the General Assembly has apparently reinstated the common law *defense*, reducing the defendant's burden of proof, while making the defense inapplicable in cases requiring only proof of a "knowing" culpable mental state. *Bowen v. State*, 268 Ark. 1088, 598 S.W.2d 447 (Ark. App. 1980) squarely addresses and decides the latter point. Unfortunately, as is pointed out in Liebman, *Voluntary Intoxication as a Defense to Crime*, 1983 Ark. Law Notes 29, 31-32 (1983), the *Bowen* decision "is in conflict with the commentators, the drafters of the Model Penal Code, and a number of other courts which have ruled on the question," as well as with language in its previous decision in *Ellis v. State*, 267 Ark. 690, 694, 590 S.W.2d 309, 312 (Ark.

App. 1979) ("defense" applicable where "knowing" or "purposeful" conduct involved, but defendant must prove "defense" by preponderance of evidence). In addition, the Court of Appeals has cited *Ellis* with approval in *Johnson v. State*, 6 Ark. App. 342, 642 S.W.2d 324 (1982), decided after *Bowen*. AMCI 4005.1 adopts the *Bowen* distinction, the reservations of some members of the Criminal Jury Instruction Committee notwithstanding. *Liebman, supra* at 32-33 and footnote 66.

The cases are confusing in regard to whether intoxication is now a defense or an affirmative defense. It should be noted that before adoption of the Code the Court did not distinguish between "defenses" and "affirmative defenses" using those terms. What are now called "affirmative defenses" placing the burden of proof upon the defendant were recognized, but were denominated "defenses." See, *Casat v. State*, 40 Ark. 511, 522-23 (1883). More recently, *Bowen, supra*, pointed out that "(t)he Arkansas common law developed that voluntary intoxication is a defense to crimes requiring a 'specific intent.' " *Id.* at 1092, 598 S.W.2d at 449 (emphasis added). See also, for example, *Murray v. State*, 209 Ark. 1062, 194 S.W.2d 182 (1946). But see *Ellis v. State*, 267 Ark. 690, 694, 590 S.W.2d 309, 312 (1979) ("While self-induced intoxication appears to remain a common law defense to a crime in which an essential element is that the act be done knowingly or purposefully, the defendant has the burden of establishing the defense by a preponderance of the evidence") (emphasis added); *Gonce v. State*, 11 Ark. App. 278, 280, 669 S.W.2d 490, 491 (1984) ("in establishing his defense of intoxication, appellant was required to prove by a preponderance of the evidence that he could not have entertained or formed the necessary intent or purposeful mental state . . .") (emphasis added). Also, see *Varnedare v. State, supra*: "(U)nder the case law, as expressed in *Ollies & Anderson v. State*, the defense of self-induced intoxication was available to the appellant, if it rendered him incapable of forming the intent that was a necessary element of the crime." *Id.* at 599, 573 S.W.2d 60. In addition, see *Johns v. State*, 6 Ark. App. 74, 637 S.W.2d 623 (1982) in which "voluntary intoxication" is referred to both as a "defense" and an "affirmative defense"; and *Harmon v. State*, 277 Ark.

265, 270, 641 S.W.2d 21, 24 (1982) ("The court properly refused a proffered instruction submitting voluntary intoxication as an affirmative defense. Such intoxication is no longer a defense except possibly (sic) with respect to a crime requiring specific intent.")

The most recent Court of Appeals decision bearing on intoxication as a "defense" holds that intoxication is an "affirmative defense" and that AMCI 4005.1 is "an incorrect statement of the law." *Coleman v. State*, 12 Ark. App. 214, 215-16, 218, 671 S.W. 2d 221, 222-24 (1984).

AMCI 4005.1 now requires an instruction stating that voluntary intoxication is a defense to the extent that it negates a purposeful mental state. *Varnedare, supra*, is cited in support of this position.

The affirmative defense provided by the statute in its original form was found constitutional in *Hobgood v. State*, 262 Ark. 725, 562 S.W.2d 41, cert. denied, 439 U.S. 963 (1978), the Arkansas Court relying on *Patterson v. New York*, 432 U.S. 197 (1977). But *Hobgood, supra* notwithstanding, since a culpable mental state is an element of every offense and the State must prove each element beyond a reasonable doubt, requiring a defendant to negate a culpable mental state by a preponderance of the evidence might be unconstitutional. In *Re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Compare *Patterson v. New York*, 432 U.S. 197 (1977) (conviction affirmed where defendant not required to disprove element of offense by preponderance of evidence). Given that self-induced intoxication may render a defendant incapable of forming the purposeful mental state required to commit an offense, it can be argued that a defendant may only be required to produce evidence casting reasonable doubt on whether he formed the requisite purpose. The State must then disprove the defense — i.e., prove the culpable mental state element — beyond a reasonable doubt. To hold otherwise may impermissibly shift the burden of proof to the defendant on the element of the offense, contravening *Mullaney* and *Winship, supra*.

See AMCI 4005.1. Also, see *Long v. Brewer*, 667 F.2d 742, 747 (8th Cir. 1982), where court virtually concedes that in cases involving negating of culpable mental state by intoxication *Mullaney* and

Patterson reach divergent, "illogical" results.

Burden of Proof

In *Mosier v. State*, 285 Ark. 67, 684 S.W.2d 810 (1985), while discussing an instruction offered on the intoxication defense, the Supreme Court remarked:

We are aware that some confusion surrounds the defense of voluntary intoxication. . . . We may choose to

re-examine our position when we have adversary briefs on the subject. *Id.* at 69, 684 S.W.2d at 811.

One may reasonably conclude that the Supreme Court will soon answer questions raised by the Court of Appeals' decisions in *Gonce v. State*, 11 Ark. App. 278, 669 S.W.2d 490 (1985) and *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984).

Original Commentary to § 5-2-208

For the most part, this section simply restates previous Arkansas statutory law formerly found at Ark. Stat. Ann. § 41-117 (Repl. 1964). *Cf.*, former § 41-114 (Repl. 1964). Decisional law is sparse. The only case found involving duress as an issue in a criminal proceeding was *Edwards v. State*, 27 Ark. 493 (1872). Resort to the defense of duress in civil litigation is more common, and there it has virtually the same ambit as in a criminal prosecution. See, e.g., *Fondville v. Wichita State Bank & Trust Co.*, 161 Ark. 93, 96, 255 S.W. 561, 562 (1923); and *Perkins Oil Co. of Delaware v. Fitzgerald*, 197 Ark. 14, 121 S.W.2d 877 (1938). The section follows earlier law by making duress an affirmative defense. See, *Edwards, supra*.

Subsection (b) adopts, almost verbatim, the greater part of M.P.C. § 2.09(2), about which the Model Penal Code Reporter comments as follows:

"subsection (2) accepts the view that there should be no exculpation if the actor recklessly placed himself in a situation in which it was probable that he would be

subjected to duress. Though this provision may have the effect of sanctioning conviction of a crime of purpose when the actor's culpability was limited to recklessness, we think the substitution is permissible in view of the exceptional nature of the defense. The provision will have its main room for operation in the case of persons who connect themselves with criminal activities, in which case too fine a line need not be drawn. When there is no more than negligence, however, on the actor's part in placing himself in a situation where duress was probable, we follow the normal pattern of the Code. The defense is excluded only on a charge as to which negligence suffices to establish culpability. . . . The difference between inadvertence and the conscious risk creation involved in recklessness appears to us to justify discriminating in this way." *M.P.C. § 2.09, Comment at 8 (Tent. Draft No. 10, 1960).*

For an extended discussion of the defense of duress, see, *M.P.C. § 2.09, Comment at 2 (Tent. Draft No. 10, 1960).*

1988 Supplementary Commentary to § 5-2-208

Roleson v. State, 272 Ark. 346, 614 S.W.2d 656 (1981) read into the statute the unstated requirement that the defendant show "fear excited by threat" where the "danger (is) present or immediate." *Id.* at 349, 614 S.W.2d at 658. The Court relied on *Froman v. State*, 232 Ark. 697, 700, 339 S.W.2d 601, 603 (1960), which in turn went off on a statement from *Wharton's Criminal Evidence* on the vitiating of accomplice liability by threats or menaces creating fear of immediate danger to life or member.

In *Meador v. State*, 10 Ark. App. 325, 664 S.W.2d 878 (1984), the defendant raised the affirmative defense of duress in a robbery prosecution after having given testimony from which it could be inferred that he was forced to commit the offense by men to whom he owed money for drugs. The Court of Appeals held that this inference justified the trial court's instructing the jury that the defendant could not claim the affirmative defense if he recklessly placed himself in a situation where it was reasonably foreseeable that he

would be threatened with force unless he committed the crime charged. *Id.* at 330, 664 S.W.2d at 881. See § 5-2-208(b). Accordingly, under *Meador* a defendant can recklessly deprive himself of the affirmative defense of duress by conduct chronologically far removed from the date of the offense charged. Moreover, because “reck-

lessness” contemplates ignoring a perceived risk, *Meador* indicates that the court will impute to defendants considerable foresight in regard to past conduct when this conduct is asserted to be relevant to the affirmative defense of duress.

See AMCI 4006.

Original Commentary to § 5-2-209

The language of this section is taken from Proposed Federal Code § 702.

Entrapment was previously an affirmative defense in Arkansas. *Brown v. State*, 248 Ark. 561, 453 S.W.2d 50 (1970). Subsection 5-2-209(a) thus accords with former law in allocating the burden of proof. Section 5-2-209 also leaves undisturbed the rule that entrapment cannot be simultaneously interposed with a defense predicated on the theory that the defendant did not engage in the conduct alleged to constitute the offense. *Brown, supra*, relying on *Rodriguez v. United States*, 227 F.2d 912 (5th Cir. 1955).

Subsection 5-2-209(b) represents the first attempt in Arkansas at statutory prescription of an entrapment test. The formulation previously used appears in *Peters v. State*, 248 Ark. 134, 450 S.W. 2d 276 (1970): “Entrapment does exist where the criminal designs originate not with the accused, but with the officers of the law, and the accused is lured into the commission of an unlawful act by persuasion, deceitful representation or induce-

ment by the officers.” *Id.* at 134, 450 S.W.2d at 278. The Arkansas court has not as yet confronted the controversy over whether entrapment should focus on the defendant’s predisposition to commit the offense or on the degree of governmental participation in the criminal activity. See, *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 366 (1973). Subsection 5-2-209(b) departs from the majority opinion in *Russell*, attributing more importance to the conduct of the law enforcement officer than to any predisposition of the defendant. It simply asks the jury to consider the effect of the officer’s conduct on a hypothetical average citizen, rather than its effect on the particular defendant. The obvious purpose of the formulation is to discourage government activity that might induce innocent persons to engage in criminal conduct. The final sentence of subsection (b) makes it clear that some government involvement in criminal activity in the interest of law enforcement is tolerable.

1988 Supplementary Commentary to § 5-2-209

Spears v. State, 264 Ark. 83, 568 S.W.2d 492 (1978), placing emphasis on the original commentary to § 5-2-209, contains the most comprehensive discussion of this affirmative defense. In particular, the decision establishes that the primary focus of the defense is the conduct of the law enforcement officer, though the defendant’s predisposition to commit the offense is also relevant. *Id.* at 92, 96-97, 568 S.W.2d at 498-99, 501; original commentary to § 41-209. See, also, *Rhoades v. State*, 270 Ark. 962, 607 S.W.2d 76 (1980), *cert. denied*, 452 U.S. 915 (1981). In reli-

ance on *Spears, supra*; *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982); and Ark. Uniform Rules of Evidence 509(a), the Court of Appeals has held that “(a)lthough evidence of the *conduct* of (an) informant in the presence of the appellant was admissible, the State was clearly entitled to protect the *name* and *identity* of the informant” *Walls v. State*, 8 Ark. App. 315, 322, 652 S.W.2d 37, 40 (1983) (emphasis added), *aff’d*, 280 Ark. 291, 658 S.W.2d 362 (1983).

See AMCI 4007.

Original Commentary to § 5-2-301

This section elaborates on the meaning of “appropriate institution” as used in § 5-2-314. It permits the director of the state hospital to place defendants committed to his custody in out-of-state institutions.

Such action may be desirable if the defendant is in need of special treatment that the state hospital is not equipped to provide.

Original Commentary to § 5-2-302

This section adopts the rule with respect to competency to stand trial accepted in all United States jurisdictions

and previously recognized as the criteria in Arkansas. The precise language was adopted from M.P.C. § 4.04.

Original Commentary to § 5-2-303

This section sets forth the rule that is clearly the modern trend — that evidence of mental disease or defect not meeting the criteria for a complete defense set out in § 5-2-303 is admissible on the issue of whether the defendant possessed the kind of mental state necessary for the commission of the offense charged (e.g., “purposefully,” “premeditated,” etc.). General principles of criminal law would seem to dictate such a result. Still, many jurisdictions have refused to allow the defendant to introduce evidence of mental illness for this purpose. See, *Fisher v. United States*, 328 U.S. 463, 66 S. Ct. 1318, 90 L. Ed. 1382 (1946).

In adopting a provision similar to § 5-2-303, and specifically rejecting a rule that would limit evidence of mental disease or defect to situations where the defendant is relying on a complete insanity defense, the Model Penal Code comments: “We see no justification for a limitation of this kind. If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence.” M.P.C. § 4.02, *Comment at 193* (Tent. Draft No. 4, 1955).

1988 Supplementary Commentary to § 5-2-303

The Supreme Court has held that this section simply permits the introduction of mental disease or defect evidence bearing on the defendant’s capacity to form a requisite culpable mental state even though the evidence is less than persuasive in connection with an affirmative defense of insanity. It does not entitle the defendant to a specific instruction informing the jury that they should consider any evidence of mental disease or defect in determining

whether the defendant possessed the culpable mental state required for the commission of the offense charged since such an instruction is effectively given when the jury is instructed that the state must prove all elements of the offense beyond a reasonable doubt. See *Westbrook v. State*, 274 Ark. 309, 624 S.W.2d 433 (1981); *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

Original Commentary to § 5-2-304

Former Arkansas law did not require the defendant to give advance notice concerning the defense of insanity or his fitness to proceed in order to litigate those issues. Lack of timely notice may, however, affect the availability of a psychiatric examination provided by the state. Ark.

Stat. Ann. § 43-1304 (Supp. 1973) [§ 16-86-107]. Because of the complexity of both issues, and the obvious desirability of giving the prosecutor adequate time to conduct his own investigation on the matter, § 5-2-304(a) establishes a general notice requirement. The argument that requir-

ing a defendant to give notice of the defense of insanity might somehow violate his constitutional privilege against self-incrimination was rejected by the Commission as it has been by the courts.

The more difficult question concerned whether to establish a definite time limit (e.g., 30 days before trial) which the defense must adhere to in giving the required notice. That type of time limitation was rejected by the Commission in favor of the more flexible "earliest practicable time" standard. Rejection of the specific time limit was based to a large extent upon recognition of the fact that indications of a defendant's mental disease or defect might not appear until shortly before trial when the pressures on the defendant are at their greatest.

Section 5-2-304(b) sets out procedures

to be followed if the defense fails to give the required notice. The Commission considered and rejected the suggestion that failure to give timely notice should preclude the defendant from litigating the issues. While such a sanction might be appropriate in a civil suit, in a criminal trial where the defendant's liberty is at stake all relevant issues should be considered. Also, that type of sanction would probably run into constitutional difficulties. The court always has available under its inherent judicial power the sanction of "contempt" for the attorney who intentionally fails to comply. The Commission felt the contempt sanction would provide the necessary deterrence to counsel's willful failure to comply with the notice requirement.

Original Commentary to § 5-2-305

Subsection 5-2-305(a) is basically a restatement of pre-existing Arkansas law. Ark. Stat. Ann. § 43-1301 (Supp. 1973) [§ 16-86-105]. Under this provision, the procedures set out in the remaining provisions of this section for obtaining a psychiatric examination and report on the defendant's mental condition can be set in motion by the defendant or by the court sua sponte. The major change to prior Arkansas law is the availability of these procedures to persons charged with misdemeanors as well as felonies, thus superseding the holding of *Townsend v. City of Helena*, 244 Ark. 228, 424 S.W.2d 856 (1968), to the effect that only those charged with felonies are entitled to commitment to the state hospital upon a plea of insanity. The risk that those charged with misdemeanors might abuse the availability of a psychiatric examination is minimal since a finding of mental illness might lead to indefinite commitment while conviction would result in exposure to a maximum of one year's imprisonment.

As originally enacted, the Code also permitted raising the insanity defense in inferior courts. Act 360 of 1977 amended § 5-2-305, and § 5-2-305(a) now speaks of "a defendant charged in circuit court."

The other noteworthy feature of subsection (a) is the statement that a discharge of the trial jury shall not bar a future

prosecution. The Commission recognized that this provision may be constitutionally suspect because of former jeopardy considerations. See, *Cody v. State*, 237 Ark. 15, 371 S.W.2d 143 (1963). Constitutional arguments aside, the Commission believed this to be a desirable provision, and, absent a definitive judicial decision prohibiting a second trial, decided to include the provision allowing a subsequent prosecution.

Subsection (a) expands on prior Arkansas statutory law in that it sets out alternatives for the court not specifically provided for in Ark. Stat. Ann. § 43-1301 (Supp. 1973) [§ 16-86-105] but currently utilized by many circuit courts: (1) appointing a qualified psychiatrist to conduct the examination; (2) directing the director of the Arkansas state hospital to conduct the examination. Both of these alternatives allow, in an appropriate case, for the examination to be conducted at the local jail or in the community. The Commission recognized that in most cases a jailhouse psychiatric examination would be inadequate. However, the Commission did not want to completely rule out that approach in an appropriate case and determined the matter could best be left to the discretion of the trial court. In any event, should a local examination prove inadequate the court could subsequently order an examination at the state hospital under subsection (c).

Nothing in previous Arkansas law set out the information that the psychiatric report should contain. This became a serious problem as many reports provided little information on the nature of the examination, confused questions of com-

petency and responsibility, and often spoke exclusively in medical terms such as "psychosis." Subsections (d) through (h) are designed to promote more comprehensive reports relevant to the legal, rather than medical, problems of the defendant.

1988 Supplementary Commentary to § 5-2-305

Costs of Examination

In *Mears v. Arkansas State Hospital*, 265 Ark. 844, 581 S.W.2d 339 (1979) the Supreme Court construed § 5-2-305(i) as obligating the state to pay only the cost of the personnel making the examination required by this section, thus leaving other costs such as room and board during the period of examination to be borne by the county from which the defendant was originally committed. The General Assembly responded in 1983 by amending the section to clearly require the state to bear all costs of room and board until the psychiatric examination is completed and for three days thereafter.

The Supreme Court has rejected the contention that *Gideon v. Wainwright*, 372 U.S. 335 (1963) entitles a defendant to examination by a psychiatrist of his own choice at state expense. *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Andrews v. State*, 265 Ark. 390, 578 S.W.2d 585 (1979).

The Court has strictly enforced the defense counsel's right to be furnished all medical records in the possession of public agencies. In *Hayes v. State*, *supra*, it reversed a conviction after the trial court ruled certain lay and professional staff reports regarding the defendant's mental condition to be outside the scope of discovery. In *Westbrook v. State*, *supra*, the Court held that the trial court abused its discretion in refusing to grant a continuance until defense counsel had received the full records of the State Hospital pertaining to his client.

Until recently, the Court did not require strict compliance with subsection (d), which sets out the information to be contained in the report of the examining physician. *Ball v. State*, 278 Ark. 423, 646 S.W.2d 693 (1983). This has changed. The Court has held that the requirements of § 5-2-305(d) (1987) are mandatory. Failure to provide the specified kinds of infor-

mation may result in the necessity for further observation and examination. *Vance v. State*, 288 Ark. 274, 704 S.W.2d 170 (1986).

Right of Indigent to Psychiatrist

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985), the United States Supreme Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is likely to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. It therefore appears that decisions such as *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981) were well grounded.

Referral to Arkansas State Hospital Constitutionally Adequate

The Arkansas Supreme Court has repeatedly held that referral to the Arkansas State Hospital for evaluation of capacity to assist in a defense and sanity at the time of the offense satisfies the requirements of *Ake v. Oklahoma*, the defendant not being entitled to the assistance of a psychiatrist not affiliated with the state or county. *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987); *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986).

Report Raising Reasonable Doubt Triggers Full Examination Requirement Under § 5-2-305(c)

In *Jacobs v. State*, 294 Ark. 551, 744 S.W.2d 728 (1988), on motion of defense counsel, the trial court ordered that appellant be examined by a local psychiatrist. The psychiatric report stated, "Because of the impairment in his ability to cooperate

with his attorney, I feel his competency to stand trial is highly questionable. *Id.* at 553, 744 S.W.2d at 729. Appellant moved for commitment under § 5-2-305(c). The trial court denied the motion. On appeal the Arkansas Supreme Court held that the report in question raised a reasonable doubt about appellant's competency and that a full examination and report under § 5-2-305(c) was required.

Under § 5-2-305(a)(1) and (2) the trial court must suspend all proceedings and enter an order under subsection (b) if "there is reason to believe that mental disease or defect ... will or has become an issue" (§ 5-2-305(a)(1)) or "there is reason to doubt [defendant's] fitness to proceed" (§ 5-2-305(a)(2)). Without advertent to this statutory requirement, the Arkansas Supreme Court has held that a due process evidentiary hearing is constitutionally compelled whenever there is "substantial evidence" that the defendant may be mentally incompetent to stand trial.

Hicks v. State, 294 Ark. 474, 744 S.W.2d 383 (1988), citing *Speedy v. Wyrick*, 702 F.2d 723 (8th Cir. 1983). The Court's opinion in *Hicks* went on to say:

"Substantial evidence" is a term of art. "Evidence" encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. ... At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue.

294 Ark. at 476-77, 744 S.W.2d at 384, quoting from 702 F.2d at 725.

Original Commentary to § 5-2-306

This section is a restatement of pre-existing Arkansas law. See, Ark. Stat.

Ann. § 43-1301 (Supp. 1973) [§ 16-86-105].

1988 Supplementary Commentary to § 5-2-306

The expenses of an examination by experts of his own choice must be borne by the defendant. *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981); *Westbrook v.*

State, 265 Ark. 736, 580 S.W.2d 702 (1979); *Andrews v. State*, 265 Ark. 390, 578 S.W.2d 585 (1979).

Original Commentary to § 5-2-307

As amended by Act 360 of 1977, § 5-2-307 applies the Uniform Rules of Evidence to statements made by a defendant in the course of examination or treatment. The applicable rule is Rule 503 codified as part of Ark. Code Ann. § 16-41-101 (1987).

This section formerly read:

"A statement made by a person during examination or treatment pursuant to Chapter 6 [§§ 41-601 — 41-617] Chapter 2, subchapter 3 [§§ 5-2-301 to -2-325] shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition, but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication, unless such statement constitutes an

admission of guilt of the offense charged."

While this formulation was intended to encourage candor on the part of a defendant, it also permitted him to tell one story to his examiners and another at trial without fear of impeachment. To prevent this sort of abuse, and because there was no apparent justification for exempting a defendant's statements from the coverage of the Uniform Rules, the original version was amended out.

Accordingly, statements are admissible but only as to the issue of the existence of mental disease or defect. The section is thus less restrictive than original Code provision § 5-2-307, but more restrictive than old law allowing testimony as to such

a statement to be considered on the issue of guilt. See, *Hall v. State*, 209 Ark. 180, 189 S.W.2d 917 (1945).

1988 Supplementary Commentary to § 5-2-307

In *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342, cert. denied, 449 U.S. 852 (1980), the defendant argued that the court should have excluded all evidence seized based on information provided by the private psychiatrist who was treating the defendant. The court held that Rule 503 of the Uniform Rules of Evidence

[Ark. Code Ann. § 16-41-101] was not violated so long as the psychiatrist himself did not testify and that the “fruit of the poisonous tree doctrine” was not applicable since the violation of the physician-patient privilege was by the psychiatrist and not the police.

Original Commentary to § 5-2-308

This section elaborates somewhat on pre-existing law found at Ark. Stat. Ann. § 43-1302 (Supp. 1973) [§ 16-86-106].

1988 Supplementary Commentary to § 5-2-308

The trial court may admit non-expert testimony concerning the mental condition of the defendant provided a proper foundation for such testimony is laid. *Avery v. State*, 271 Ark. 584, 609 S.W.2d 52 (1980); *Phillips v. State*, 266 Ark. 883, 587

S.W.2d 83 (Ct. App. 1979) (finding no reversible error in excluding such testimony when defense counsel failed to preserve point for appeal); *Little v. State*, 261 Ark. 859, 554 S.W.2d 312 (1977) (involving pre-Code insanity test).

Original Commentary to § 5-2-309

This section adopts the position, advanced by the Model Penal Code and accepted in most jurisdictions, that the court rather than the jury hears and determines

the issue of fitness to proceed. It further allows the court to make its determination on the basis of the report alone, if the report is uncontested.

1988 Supplementary Commentary to § 5-2-309

The Code is unclear as to who has the burden of proof on the issue of the defendant's fitness to proceed. Based on the presumption that a defendant is competent to stand trial, the Supreme Court has held that the burden of proof is on the defendant to show that he lacks the capacity described in § 5-2-302. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980). Although not specifically addressed in *Lipscomb*, the defendant must presumably satisfy the preponderance of the evidence standard applicable to affirmative defenses.

Delegating to the trial court the responsibility of determining fitness to proceed has been upheld against a constitution challenge based on Article VII, § 23 of the

Arkansas Constitution, which requires factual issues to be determined by the jury. *Rogers v. State*, 264 Ark. 258, 570 S.W.2d 268 (1978). In fact, it is reversible error for the trial court to decline to rule on the question of fitness and instead submit the question to the jury. *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 842 (1980); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979).

Section 5-2-309 authorizes the trial court to make a determination of fitness to proceed solely on the basis of the psychiatric report filed pursuant to § 5-2-305. If the court does not make such a determination after receiving the report, the defendant may waive any right to such a

determination if he does not insist on a ruling regarding his competency to stand trial. This is apparently possible even if the defendant originally filed notice pursuant to § 5-2-305(a) (2) that he intends to put into issue his fitness to proceed. In *McClellan v. State*, 264 Ark. 223, 570 S.W.2d 278 (1978), the defendant's attorney initially requested that the defendant be examined by a psychiatrist. The report of the psychiatrist concluded that the defendant was free from psychosis and competent to stand trial. The court proceeded to try the defendant without making an affirmative determination that he was fit to proceed. On appeal the Supreme Court held that even assuming the defendant's request for a psychiatric examination was a motion for determination of fitness to proceed, it was incumbent upon defense counsel to bring the motion to the court's attention after the psychiatric report was filed if the defendant still desired a ruling on the issue.

While probably correct given the facts of the *McClellan* case, the Court's opinion should not be interpreted broadly as dispensing with the necessity of a determination under § 5-2-309 in every case in which defense counsel fails to renew a motion to determine fitness following the filing of the report of psychiatric examination. If there is evidence before the trial court, whether from the psychiatric court or other pre-trial proceeding, sufficient to raise a bona fide doubt as to the defendant's competency to stand trial, the due process clause of the United States Constitution requires that the trial court hold a hearing and make a determination of fitness before proceeding. *Pate v. Robinson*, 383 U.S. 375 (1966). As the United States Supreme Court observed in *Pate v. Robinson*: "(It) is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have a court determine his capacity to stand trial." 383 U.S. at 384. See also, *Drope v. Missouri*, 420 U.S. 162 (1975).

In summary, a § 5-2-309 hearing must be held and a determination of fitness made in every case in which (1) defense counsel moves for a determination of fitness to proceed following the submission of the report of psychiatric examination; or (2) there is evidence sufficient to raise a bona fide doubt as to the defendant's competency to stand trial, even though defense counsel does not move for a determination of fitness to proceed. A hearing and determination is clearly mandated by § 5-2-309 in the first situation since the renewal of a motion for determination of fitness following the submission of the psychiatric report should be deemed to "contest" the findings of the report. A hearing and determination is required in the second case by the holding in *Pate v. Robinson*, *supra*. This analysis of the requirements under § 5-2-309 is supported by the Eighth Circuit decision in *Collins v. Housewright*, 664 F.2d 181 (8th Cir. 1981) in which a prisoner collaterally attacked his Arkansas conviction on the grounds that the trial court failed to make the determination required by § 5-2-309. Defense counsel initially raised the issue of fitness to proceed under § 5-2-305 after interviewing his client and determining that the defendant was unable to converse with him and spoke of frequent blackouts and inability to remember information. The trial court ordered a psychiatric examination, but the defendant never kept the appointment, and defense counsel did not pursue the issue or raise the question of competency during trial. The Court of Appeals did not address the state law question whether a hearing and determination was required under § 5-2-309. It did examine the evidence in light of the holding in *Pate v. Robinson* and determined that the granting by the state court of the § 5-2-305 motion, together with the representation by defense counsel in the motion concerning blackouts and inability to remember information, was not sufficient to raise a bona fide doubt as to defendant's competence.

Original Commentary to § 5-2-310

In most jurisdictions when the defendant is determined to be incompetent to stand trial, he is committed to a state mental institution until his competency is restored. Yet there is no reason why a finding of incompetency should always lead to hospitalization. Subsection (a) makes clear that the court has the discretion to release the defendant pending restoration of his competency, when the defendant will not pose a "danger to himself or to the person or property of others."

Subsection (b) represents a major departure from former Arkansas law. The net effect of this subsection will be to preclude the state from hospitalization of a defendant for more than one year when the justification for the hospitalization is that the defendant is "unfit to proceed." If hospitalization is to continue after the one year period it must be under normal civil commitment procedures. See, Ark. Code Ann. § 20-47-201 *et seq.* The Commission believed such a limitation on the state

desirable on constitutional and basic fairness considerations. While the United States Supreme Court has not established definitive outside time limits for incompetency commitments, it is clear "due process" will preclude an extensive period of hospitalization where there is no indication the hospitalization is assisting in restoring competency. *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). More important, however, the Commission believed the state should not incarcerate a defendant *who has never been tried for or convicted of the criminal offense* for longer than a one year period if the only justification for the incarceration is to prepare the defendant for trial. If hospitalization is to continue beyond that time, the safeguards of a traditional civil commitment should attach.

Subsection (c) is basically a codification of the alternatives the court probably possesses under its inherent powers.

1988 Supplementary Commentary to § 5-2-310

This section allows the court to commit to the Arkansas State Hospital a person who is found to lack fitness to stand trial, but such hospitalization cannot continue for more than one year unless the state resorts to the civil commitment procedures. Although no similar limits were imposed in the original Code on a commitment under § 5-2-314 following acquittal on the grounds of mental disease, the Supreme Court extended the one year limitation to § 5-2-314 commitments in *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980). See also, *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981).

In 1983 the General Assembly passed Act 917 which requires the state to initiate civil commitment procedures under §§ 20-47-202 *et seq.* within 30 days after a § 5-2-314 commitment. The effect of this 30 day limit on § 5-2-310 commitments is unclear. The original Commentary to § 5-2-314 took the position that the need for civil commitment was less compelling following an acquittal by reason of mental

disease and defect, since "the defendant has committed an anti-social act for which he would have received punishment but for the jury's belief as to his mental illness." By contrast, the person who is found unfit to stand trial is still entitled to the presumption of innocence on the question whether he committed an anti-social act. It seems somewhat anomalous that the person found unfit to stand trial can now be hospitalized up to one year without the protection of civil commitment procedures whereas the person who is found competent to stand trial but then acquitted at trial may be hospitalized only 30 days without the necessity of civil commitment. Although as noted in the original Commentary to § 5-2-310, the United States Supreme Court has not established definitive outside time limits for incompetency commitments the adoption of a 30 day limit for commitments following acquittals undercuts somewhat any argument that one year is a reasonable period of time for incompetency commitments.

Original Commentary to § 5-2-311

This section is aimed at readily determinable pretrial motions that do not require participation of the defendant. Such motions might go to double jeopardy, statute of limitations, etc. The fact that the

defendant is unfit to proceed does not preclude counsel from raising issues which do not require the participation of the defendant and which can be determined prior to trial.

Original Commentary to § 5-2-312

This section establishes criteria for determining when individuals are to be excused for their anti-social behavior due to their mental condition at the time of the act. It must be kept in mind that, in the great majority of cases, persons excused from criminal responsibility under this section will nevertheless be removed from society and held in a state institution to receive medical-custodial care. See, §§ 5-2-314 to -316; 20-47-201 to -228.

The criteria set forth are drawn from § 4.01(1) of the Model Penal Code and embody the test adopted in a number of jurisdictions during the last fifteen years. See, e.g., 13 Vermont Stats. Ann. § 4801 (Repl. 1958); Wis., Stats. Ann. § 971.15 (Repl. 1971); 59 Maryland Code Ann. § 25(a) (Repl. 1972); and 38 Ill. Stats. Ann. § 6-2 (Repl. 1972). Cf., N.Y. Penal Law § 30.05 (McKinney 1967); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968) (en banc); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967) (en banc); and *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963) (en banc).

The test is essentially a modernized version of the traditional M'Naghten rule. As it evolved in Arkansas, the M'Naghten rule required the jury to undertake a three-pronged inquiry to determine whether: "first, . . . at the time of the offense the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he did know it, that he did not know that he was doing what was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable,

because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease." *Bell v. State*, 120 Ark. at 553, 180 S.W. at 195 (1915).

Section 5-2-312(a) states a clearer and more concise test couched in language that jurors can understand and apply.

The use of the terms "mental disease or defect" rather than simply "mental disease" is intended to add qualitative rather than quantitative dimensions to the concept of insanity. A "mental disease" is an abnormal mental condition that may respond to treatment whereas a "mental defect" connotes a disorder that is incurable. The addition of "defect" to the concept of insanity should not be interpreted to expand the scope of the defense although there is a line of Arkansas cases holding that a mental defect such as subnormal intelligence does not exempt an individual from criminal liability. See, e.g., *Stewart v. State*, 233 Ark. 458, 345 S.W.2d 472 (1961); *Ezell v. State*, 217 Ark. 94, 229 S.W.2d 32 (1950). These cases stand merely for the proposition that subnormal intelligence without more does not excuse criminal conduct. That persons of subnormal intelligence should, under certain circumstances, be exempt from criminal sanctions has been recognized by statute in Arkansas since 1836. See prior law formerly codified as Ark. Stat. Ann. § 41-109 (Repl. 1964): "An idiot shall not be found guilty or punished for any crime or misdemeanor." The proper focus of the insanity test is on the defendant's ability to appreciate or control his conduct. His inability to do so should constitute a defense to a criminal charge, whether attributable to psychosis or to severe mental retardation.

A frequent criticism of the M'Naghten rule has been its failure to consider the effect of mental disease or defect on a person's volitional faculties as well as his cognitive faculties. Medical science has

long recognized that a person who realizes that his conduct is wrong may nevertheless be incapable of self-control. The response of several jurisdictions, including Arkansas, was to expand M'Naghten to include the "irresistible impulse" theory, represented by the third prong of the test in *Bell* set out above. See, also, *Green v. State*, 64 Ark. 523, 43 S.W. 973 (1898). Section 5-2-312(a) achieves the same effect through use of the language "to conform his conduct to the requirements of law."

Section 5-2-312(a) substitutes "appreciate" for M'Naghten's "know." The purpose of the change is to make it clear that the defense of insanity is not limited to situations where the defendant intellectually "knew," as the older cases sometimes imply, but may extend to situations where, due to mental illness, the accused was not emotionally aware of the significance of his conduct.

As is pointed out by the *Commentary to Proposed Kansas Code § 21-208* (rephrasing Appendix B to the 1963 Report of New York Temporary Commission on Revision of the Penal Law): ". . . [Difficulties] inhere in the ordinary meaning of the word 'know,' as applied to persons suffering from serious mental illness. The fact that the defendant is able to verbalize the right answer to a question, to respond, for example, that murder or stealing is wrong, or the fact that he exhibited a sense of guilt as by concealment or by flight, is often taken as conclusive evidence that he knew the nature and the wrongfulness of his behavior. Yet one of the most striking facts about the abnormality of many psychotics is that their way of knowing is entirely different from that of the ordinary person. In psychiatric terms, their knowledge is usually divorced from all effect, which is to say that it is like the knowledge children have of propositions they can state but cannot understand; it has no depth and is divorced from comprehension. The present rule makes it very difficult to put this point before the jury, though it often is the crucial point involved. It seems clear that the knowledge that should be deemed material in testing responsibility is more than merely surface intellection; it is the appreciation sane men have of what it is that they are doing and of its legal and its moral quality." *Proposed Kansas Code* at 36.

The formula also speaks in terms of the defendant's capacity to appreciate the "criminality" of his conduct, as opposed to the "wrongfulness" of his conduct, which is suggested by the Model Penal Code as alternative language. There has always been some question under the M'Naghten test as to whether "wrong" means morally wrong or legally wrong. See, Annot., 45 A.L.R.2d 1447, 1454 (1956); *Bell, supra*. To contend that it means legally wrong implies that the defendant must know that his act is a violation of the criminal law, a proposition that runs counter to the general rule that all persons are presumed to know the law. As pointed out in *Bell, supra*, at 559, 180 S.W. at 197, the jury might be led to believe that ignorance of the law was an excuse. On the other hand, the view that the wrong contemplated is to be judged by moral rather than legal standards might be construed to exempt the individual who was fully aware that his conduct was contrary to law, but felt that it was justified under his own personal, aberrant sense of moral values. "Criminality" subsumes the concepts of both "morally wrong" and "legally wrong." Thus, the defendant does not escape liability if he was mentally capable of appreciating either the immorality or the illegality of his conduct.

In establishing the criteria, patterned to an extent after M'Naghten, the Commission was not unmindful of the severe criticism M'Naghten has received from legal, medical, and philosophical experts, and recognizes that some of the same criticisms are applicable to § 5-2-312(a). Still, while criticisms of M'Naghten abound, theoretically and constitutionally sound pragmatic suggestions for dealing with the problem are rare. Complete abandonment of the insanity defense, seriously suggested by many, would present thorny "due process" problems. Leaving the matter entirely up to the jury to determine "whether at the time of the act the accused was suffering from a disease of the mind to such a degree that he ought not to be held responsible" (*Report, Royal Commission on Capital Punishment*, § 333 at 116 (1953)) would allow in the opinion of the Commission too much unfettered discretion to the trier of the fact. The Durham rule (*Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954)) has been specifically rejected as an acceptable

alternative by practically all states that have faced the issue, including Arkansas. *Stewart v. State*, 233 Ark. 458, 345 S.W.2d 472 (1961). The District of Columbia itself has recently abandoned Durham. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

Likewise, the Commission was aware of the consideration that any change in the existing criteria, however slight, runs the risk of creating confusion by calling into question years of case law refining the existing criteria. In this instance, however, we believe the advantages of the change, particularly in the area of adopting language the jury should be able to comprehend and apply, outweigh countervailing considerations. Moreover, as pointed out above, the Model Penal Code formulation on which § 5-2-312(a) is based has already been adopted with slight variations in a number of other jurisdictions. Consequently, the courts of Arkansas will not be forced to interpret the test in a judicial vacuum but rather can draw on a body of case law construing a test stated in substantially the same language.

Lack of "responsibility" is made an affirmative defense, thus requiring the defendant to establish by a preponderance of

the evidence that he met the criteria of § 5-2-312(a) at the time of the act. In some jurisdictions the state is required to establish the defendant's mental capacity beyond a reasonable doubt. In others, the state must prove the defendant's mental capacity by a preponderance of the evidence. A third group of jurisdictions place on the defendant the burden of establishing his incapacity by a preponderance of the evidence. See, 20 Ark. L. Rev. 398 (1967). The Commission felt the latter alternative to be the sounder approach due primarily to considerations of (1) the presumption of sanity and (2) the unique control the accused may have over inquiries into, and determinations of, his mental state.

Section 5-2-312(b) is designed to bar the so-called psychopathic or sociopathic personality from utilizing the insanity defense, when the only evidence of mental illness is repeated criminal conduct. With the medical profession unable to agree on whether for medical purposes these personality types should be classified as mentally ill, the Commission felt it wise to state that for the purpose of determining the defendant's responsibility, these personality types should not be considered to possess a "mental disease or defect."

1988 Supplementary Commentary to § 5-2-312

When this section was originally drafted, there appeared to be no constitutional obstacle to denominating lack of capacity due to mental disease or defect as an affirmative defense, thereby placing upon the defendant the burden of proving by a preponderance of the evidence that he was insane at the time of the act. Since the United States Supreme Court had upheld in *Leland v. Oregon*, 343 U.S. 790 (1952) an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt, a statute imposing the less onerous burden of proving the defense by a mere preponderance of the evidence was thought to present no problems.

Shortly after the adoption of the Code, however, the United States Supreme Court invalidated a Maine statute that placed upon a defendant charged with homicide the burden of proving by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation in order to reduce

what would otherwise be murder to manslaughter. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Chief Justice Burger and Justice Rehnquist joined in a concurring opinion expressing their understanding that *Mullaney* did not overrule *Leland*. They distinguished the Maine statute, which defined the elements of an offense including the culpable mental state required and then shifted to the defendant the burden of proof on the culpable mental state, from the Oregon statute, which required the state to prove all elements of the offense, including the fact that defendant acted with the required culpable mental state, before the jury considered the defendant's contention that he was legally insane. 421 U.S. at 705, 706. This understanding of the effect of *Mullaney* on *Leland* was endorsed by the Court in *Patterson v. New York*, 432 U.S. 197 (1977), which involved a New York statute that permitted a person accused of murder to raise as an affirmative defense that

he acted under the influence of extreme emotional disturbance for which there was a reasonable excuse or explanation. The majority opinion put to rest any doubt as to the constitutionality of a statute that requires a defendant to prove his insanity at the time of the act by a preponderance of the evidence:

Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case in which the appellant specifically challenged the continuing validity of *Leland v. Oregon*. This occurred in *Rivera v. Delaware*, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976), an appeal from a Delaware conviction which, in reliance on *Leland*, had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The claim in this Court was that *Leland*, had been overruled by *Winship* and *Mullaney*. We dismissed as not presenting a substantial federal question.

432 U.S. at 205.

When in 1979 a defendant challenged the Code's treatment of insanity as an affirmative defense, the Arkansas Supreme Court had little trouble dismissing the argument on the basis of the quoted language from *Patterson. Andrews v. State*, 265 Ark. 390, 578 S.W.2d 585 (1979). See, also, *Stanley v. Mabry*, 596 F.2d 332 (8th Cir. 1979), *cert. denied*, 444 U.S. 946 (1979).

See AMCI 4009.

Entitlement to Instruction

The law is unclear about the quantum of evidence that must be adduced before the right to an instruction on insanity arises. Prior to adoption of the new § 5-2-312 standard in the 1976 criminal code, the Arkansas Supreme Court had ruled that where State Hospital physicians had opined that claimant had a "schizoid personality" but knew the difference between right and wrong, appellant was entitled to

an instruction. *Smith v. State*, 240 Ark. 726, 401 S.W.2d 749 (1966). There was also testimony by a deputy sheriff and appellant's parents that he was not a normal person.

Recently, the Arkansas Court of Appeals went the other way in a case presenting similar facts. In *Briggs v. State*, 18 Ark. App. 292, 715 S.W.2d 223 (1986), appellant presented expert testimony that he had been diagnosed at a Veterans Administration Hospital as having a post-traumatic stress syndrome. He was in fact being treated for this. His symptoms included depression, suicidal ideation, and flashbacks from Vietnam combat experiences. Appellant's wife testified that he gave away things, including their children's bicycles, because of an unreasonable need to be accepted and liked by others. Appellant had recently yielded to entreaties of an undercover agent wanting him to sell her cocaine.

Appellant relied on *Hall v. State*, 286 Ark. 52, 689 S.W.2d 524 (1985) in which the Arkansas Supreme Court found that it was error to refuse an instruction where there was the slightest evidence to warrant it. The Court of Appeals found that *Hall v. State* applied only to instructions on lesser included offenses. It went on to point out that appellant's expert witness testified that he understood right from wrong. The significance of this is unclear, the "right from wrong" test having been abolished. The court concluded that "appellant simply failed to produce enough evidence to justify his proffered jury instruction on mental disease or defect." *Id.* at 298, 715 S.W.2d at 226.

Neither the *Smith* opinion nor the *Briggs* case articulates a standard to be used by the trial court in ascertaining whether an instruction should be given in the face of conflicting evidence. Since the defendant has the burden of proving the affirmative defense by a preponderance of the evidence, the better practice would appear to call for the trial court to submit an instruction to the jury even in questionable cases, unless it finds that no reasonable jury could conceivably make the requested finding under any circumstances.

Original Commentary to § 5-2-313

This section is patterned after M.P.C. § 4.07. Under this section in cases of extreme mental disease or defect where the lack of responsibility on the part of the defendant is clear, a trial can be avoided and the defendant can be hospitalized

under the provisions of § 5-2-314, *infra*, relating to hospitalization following an acquittal on grounds of mental illness. The desirability of such a procedure is self evident.

Original Commentary to § 5-2-314

This section deals with the disposition of an individual who is acquitted on grounds of mental disease or defect.

The Commission rejected the procedure followed in about a dozen states of committing all persons found not guilty by reason of a mental illness automatically to a mental institution. See, Lewin, *Disposition of the Irresponsible: Protection Following Commitment*, 66 Mich. L. Rev. 721 (1968). While the Commission recognized that hospitalization would probably be desirable in most cases, it did not want to rule out the possibility of release following acquittal in the appropriate fact situation. It was also influenced by the possible unconstitutionality of a procedure whereby a person acquitted of a crime is committed indefinitely to custodial care without any judicial determination of need for such treatment. See *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968), interpreting *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966). On the other hand, the Commission rejected the suggestion that all defendants found not guilty by reason of mental illness be hospitalized, if at all, under normal civil commitment laws. While an attractive theoretical argument can be made for that approach it must be recognized that the defendant has committed an anti-social act for which he would have received punishment but for the jury's

belief as to his mental illness. Therefore the Commission felt it was appropriate to create a special hospitalization procedure for persons falling into this class. Subsection (1) places on the trial court the responsibility for deciding in each case whether the defendant should be hospitalized, released, or released on conditions. This approach is consistent with pre-existing Arkansas law. Ark. Stat. Ann. § 59-411 (Repl. 1971).

Subsection (1) also addresses itself to the criteria to be utilized by the court in making the disposition decision, an issue that has received relatively little attention in any jurisdiction. Pre-existing Arkansas law was vague on this point, requiring only that the judge find "probable cause" for the hospitalization. Ark. Stat. Ann. § 59-416 (Repl. 1971). The Commission concluded that the criteria for involuntary hospitalization of a person acquitted by reason of insanity should be (1) dangerousness and (2) mental disease or defect.

Under § 5-2-314, the court is not required to hold a separate post-acquittal hearing on the question of hospitalization. In a good number of cases the medical report submitted in accordance with § 5-2-305 or the trial itself will have generated sufficient information on which to make the disposition decision.

1988 Supplementary Commentary to § 5-2-314

As indicated in the original Commentary to this section, the drafters rejected a procedure whereby a person acquitted on the grounds of insanity would be automatically committed to a mental institution as well as a procedure whereby such persons would be committed only under civil commitment laws. Instead, the original Code allowed the circuit court to order commit-

ment upon a determination that the defendant "is affected by mental disease or defect and that he presents a risk of danger to himself or the person or property of others." The constitutionality of the Code approach was confirmed in *Jones v. United States*, — U.S. —, 103 S.Ct. 3043 (1983), where the court held that acquittal by reason of insanity justified an indefi-

nite commitment until the defendant regained his sanity and was no longer a danger to himself or society.

Shortly before *Jones* was decided, the General Assembly passed Act 917 of 1983, which amended § 5-2-314 to provide that a commitment by the circuit court following an acquittal on the grounds of insanity was limited to 30 days during which time the Director of the State Hospital must initiate a commitment proceeding in probate court if he determines that the defendant is still affected by mental disease or defect and presents a danger to himself or others. If the probate court agrees that the defendant is still affected by mental disease or defect and still presents a risk of danger to himself or the person or property of others, it can order commitment as provided in the civil commitment statute, Ark. Stat. Ann. § 59-401 *et seq.* [§ 20-47-201 *et seq.*] The reason for adopting the civil commitment approach specifically rejected in the original Code is not clear. Although civil commitment following an acquittal by reason of insanity is not required by the United States Constitution, it may well be required by the Arkansas Constitution. Article 7, § 34 and Amendment 34 of the Arkansas Constitution vests jurisdiction over persons of unsound mind in the probate court. *Baker v. Young*, 121 Ark. 537, 182 S.W. 279 (1915), held that circuit courts have limited jurisdiction over insane persons incident to the exercise of their criminal jurisdiction. An acquittal by reason of insanity provides a basis for admission of the person to the State Hospital. "It does not constitute an adjudication of the *present* insanity of the person charged, but merely *prima facie* evidence of that fact upon which the accused may be held until the question of his insanity can be adjudicated in a court exercising exclusive jurisdiction over such matters." 121 Ark. at 540, 182 S.W. at 280. Section 5-2-314, as amended by Act 917 of 1983, more closely reflects the division of jurisdiction between circuit and probate courts mandated by *Baker v. Young* than did the original § 5-2-314.

Baker v. Young has been qualified by two decisions issued since the enactment of the Code. In *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980), a defendant who had been acquitted by the Franklin County Circuit Court pursuant to § 5-2-313 was committed by the court

pursuant to § 5-2-314 to the state hospital. The defendant then filed a petition for writ of habeas corpus in the Pulaski County Chancery Court seeking release on the grounds that the Franklin County Circuit Court had no jurisdiction to order his committal. The Pulaski County Chancery Court ruled that the circuit court had jurisdiction to order the commitment and denied the petition. The Supreme Court held that the one year limitation of § 5-2-310 applicable to circuit court commitments following a determination that the defendant was not fit to proceed was likewise applicable to a circuit commitment following an acquittal by reason of insanity. In its opinion, the court stated that the circuit court should have committed the defendant pursuant to the civil commitment statute rather than § 5-2-314. This did not affect the validity of the commitment since "(t)he trial court simply employed the wrong statute to do what it had the right to do under another statute." 270 Ark. at 315, 604 S.W.2d at 937. This language implies that *Baker v. Young* is no longer good law. Compare the dissent in *Stover v. Hamilton*, which found *Baker v. Young* to be indistinguishable.

In *Schock v. Thomas*, 274 Ark. 493, 625 S.W.2d 521 (1981), the court acknowledged the apparent conflict between *Stover v. Hamilton* and *Baker v. Young* but then proceeded to reconcile the two cases:

But the difference (between the two cases) is more of form than of substance, for effectually the cases are not inconsistent: both agree that the circuit court is not lacking in jurisdiction to commit in the first instance an individual who has been: (1) tried and found not guilty by reason of insanity, (2) acquitted without trial because of mental illness, or (3) found unable by reason of mental illness to assist in his defense but without dismissal of the charges. . . . Both *Stover* and *Baker* hold that aside from the initial circuit court commitment, jurisdiction belongs to probate court and that either the State Hospital or the individual can initiate civil proceedings to have his sanity adjudged. In either case, jurisdiction lies in the probate court.

274 Ark. at 499, 625 S.W.2d at 524.

The court in *Schock v. Thomas* went on to hold that an individual committed by

the circuit court who had not had his insanity adjudicated by the probate court within one year of the commitment was entitled to be released. As indicated by the discussion above, this one year period has now been shortened to thirty days, at least in the case of a commitment by the circuit court pursuant to §§ 5-2-314 or 5-2-313 following an acquittal by reason of insanity. Since no corresponding change was made to that section of the Code prescribing the procedure for commitments following a determination that a person lacks fitness to proceed (§ 5-2-310), the one year limitation may still apply to such commitments.

A defendant is not entitled to an instruction explaining to the jury the alter-

natives available to the trial court under § 5-2-314 following an acquittal by reason of mental disease or defect. *Curry v. State*, 271 Ark. 913, 611 S.W.2d 745 (1981). See, also, *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981). A conviction was reversed, however, when the trial court made remarks that might have led the jury to believe that an acquittal meant that the defendant would go free. *Love v. State*, 281 Ark. 379, 664 S.W. 457 (1984) ("The jury is not to be told the options available to the court when a defendant is found not guilty by reason of mental disease or defect and it is equally impermissible to comment on one of the alternatives, as it would be to comment on all of them." *Id.* at 382, 664 S.W.2d at 459.)

Original Commentary to § 5-2-315

This section, dealing with release from the hospital of persons committed under § 5-2-314, makes a sharp departure from prior authority. Under pre-existing Arkansas law, the decision as to whether to release patients falling into this legal category was left to the director of the state hospital. Ark. Stat. Ann. §§ 59-409, 413 (Repl. 1971). Section 5-2-315 places the release decision in the hands of the circuit court from which the defendant was committed. The Commission rejected the argument that the release procedures for persons committed under § 5-2-314, should be exactly the same as the release procedures for persons hospitalized under the civil commitment statutes. The Commission recognized that a constitutional argument might exist for such consistent treatment (*Cf.*, *Baxstrom v. Herold*, 383

U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966)), but absent a definitive holding by the United States Supreme Court on the matter, the Commission believed a different release procedure could be justified on the same considerations that justified a separate commitment procedure. See, Commentary to § 5-2-314, *supra*.

Either the director of the state hospital or the patient may initiate the release procedures established by § 5-2-315. However, subsection (b) places some sharp limitations on the frequency with which a patient can litigate the release issue.

The remaining subsections of § 5-2-315 setting out the procedures to be utilized by the court, the criteria for release, and the dispositional alternatives available to the court, are self-explanatory.

1988 Supplementary Commentary to § 5-2-315

Since thirty days is now the maximum period that a person can be committed to the State Hospital pursuant to § 5-2-314, it is unlikely that the release procedures described in this section will be employed in the future. Any detention by the State Hospital beyond the 30 day period must

be pursuant to a civil commitment by the probate court. Although a subsequent application for release should be made to the probate court, it is not clear whether the release is controlled by this section or by Ark. Stat. Ann. §§ 20-47-202 *et seq.*

Original Commentary to § 5-2-316

Subsection (a) establishes a procedure for modifying or terminating the “conditional release” authorized by §§ 5-2-314, -315.

Subsection (b) is a limitation on the state’s right to hospitalize a person subsequent to a “conditional release.” Such hospitalization must take place within five

years of the initial conditional release order. The Commission believed it unwise and unfair to subject an individual to the special commitment procedures established by §§ 5-2-314, -315 for an indefinite period of time. Dangerous persons can always be hospitalized under the civil commitment statutes.

Original Commentary to § 5-2-402

Subchapter 4 is concerned with imposition of criminal liability on one individual as a result of another person’s conduct. Subchapters 4 and 5 and subchapter 2 of chapter 3, taken together, describe most situations where accountability flows from the behavior of a person other than the defendant.

Section 5-2-401 establishes the proposition that one person may commit an offense through conduct of another. Section 5-2-402 elaborates upon the principle of vicarious liability by providing that it may be occasioned in three different ways.

Subsection 5-2-402(1) affirms liability in those cases where a statute imposes extraordinary accountability for conduct of another. Apparently, such liability accrued under pre-existing law. See, for instance, Ark. Stat. Ann. § 48-901 (Repl. 1964), having to do with certain unlawful transactions involving alcoholic beverages. See, also, *Mogler v. State*, 47 Ark. 109, 14 S.W. 473 (1886); *Edgar v. State*, 45 Ark. 356 (1885). Cf., *Beane v. State*, 72 Ark. 368, 80 S.W. 573 (1904); *Cloud v. State*, 36 Ark. 151 (1880).

Subsection (2) announces the basic principle of accomplice liability, the nature and extent of which is delineated by § 5-2-403.

Subsection (3) “is based upon the universally acknowledged principle that one is no less guilty of the commission of a crime because he uses the overt behavior

of an innocent or irresponsible agent.” *M.P.C. § 2.96(2)(a), Comment at 13 (Tent. Draft No. 1, 1953)*. Cf., § 41-304(3), *infra*. The concept of accessorial liability is, of course, not a novel one. Arkansas formerly had a statute framed broadly indeed. See prior authority previously found at Ark. Stat. Ann. § 41-119 (Repl. 1964). For certain purposes including that of punishment, the distinction between “accessories before the fact” and “principals” was abolished some time ago. See prior authority previously found at Ark. Stat. Ann. § 41-118 (Repl. 1964). With certain qualifications accessories “after the fact” were earlier also punished as “principals.” See prior authority previously found at Ark. Stat. Ann. §§ 41-120, 41-121 (Repl. 1964). Liability under the latter theory is abrogated by the Code, since the type of conduct formerly described in § 41-120 now constitutes a distinct offense under Chapter 54 (Obstructing governmental operations). The Code approach acknowledges that “behavior [giving rise to such accessory liability] is an interference with the administration of justice and should be dealt with as such, not as a basis of complicity in crimes that by hypothesis have been previously committed before the actor takes part.” *Commentary to §§ 401-425, Proposed Michigan Code at 44*.

Compiler’s Note. For 1983-1988 Supplementary Commentary, see § 5-2-403.

1988 Supplementary Commentary to § 5-2-402

Former Jeopardy Rule Bars Second Trial After Insufficient Corroboration at First Trial

The Arkansas Supreme Court has held that dismissal is the only constitutional

remedy where the State produces evidence insufficient to convict due to lack of corroboration of an accomplice. *Foster v. State*, 290 Ark. 495, 722 S.W.2d 869 (1987); *Pollard v. State*, 264 Ark. 753, 574

S.W.2d 656 (1978). See, also, *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978). See Ark. Code Ann. § 16-89-111 (1987).

Original Commentary to § 5-2-403

This section sets out the conditions giving rise to accomplice liability. It is cast in terms of acts and culpable mental states, setting these out with much greater definiteness than did old law previously codified as Ark. Stat. Ann. § 41-119 (Repl. 1964). Purposeful conduct calculated to promote or facilitate the commission of a crime is required for liability. Liability accrues only where a crime is committed, although the precise means of its commission need not be predetermined. Where a particular method is agreed upon beforehand, liability is not contingent on adherence to that method, so long as the offense is committed. See, e.g., *Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923). Further, it should be noted that § 5-2-403 is not intended to affect established authority permitting imputation of intent or purpose respecting conduct constituting a collateral offense.

"One who intentionally aids the achievement of an illegal end may be said to have intended whatever means, may be employed, insofar as they constitute or result in the commission of an offense fairly envisaged in the achievement of the illegal end. But when a wholly different crime has been committed, involving conduct not in the range of contemplation, the accomplice is not liable for such conduct." *Commentary to § 415, Proposed Michigan Code at 47*; see, also, *M.P.C. § 2.06, Comment at 24*; (*Tent. Draft No. 1, 1955*). Cf., *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970); *Johnson v. State*, 252 Ark. 1113, 482 S.W.2d 600 (1972).

If the crime actually committed is a greater inclusive offense of the offense planned, accomplice liability respecting the intended lesser included offense attaches in connection with the aider or advisor. Exemplary of the latter principle is the following hypothetical: A has the purpose of aiding B in the commission of a battery upon C. Accordingly, A drives B to the scene of the proposed offense. B decides not to adhere to the plan previously agreed upon. Instead, he murders C. Assuming A could not have reasonably envisaged the shooting, he is not an accomplice

to murder. He is, however, an accomplice in the appropriate lesser included offense of battery.

This result is consistent with that reached by the majority rule. Earlier Arkansas law was unclear but was perhaps in accord. See, e.g., *Dorsey v. State*, 219 Ark. 101, 240 S.W.2d 30 (1951); and *Boone v. State*, 176 Ark. 1003, 5 S.W.2d 322 (1928).

Subsection (a)(1) addresses the situation where one person solicits, advises, encourages, or coerces another to commit an offense that is in fact subsequently committed. Subsection (a)(2) imposes liability when a person aids, agrees to aid, or attempts to aid another person in the commission of an offense and, where again, the offense contemplated, or one that is a natural or probable consequence of that offense, is committed.

Both subsections are drawn from former Arkansas authority — prior § 41-119 (Repl. 1964) — and the Model Penal Code.

"The most important point at which the [Code] diverges from the language of the courts [see, *Boone and Dorsey, supra*] is that it does not make 'conspiracy', as such, a basis of complicity in substantive offenses committed in furtherance of its aims. It asks, instead . . . more specific questions about the behavior charged to constitute complicity such as whether the defendant commanded, encouraged, aided or agreed to aid in the commission of the crime.

"The reason for this treatment is that there appears to be no other or no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise." *M.P.C. § 2.04(3)(a), Comment at 20, 21 (Tent. Draft No. 1, 1953)*.

Subsection (a) requires that an accomplice have the purpose of promoting or facilitating the commission of an offense. Subsection (b) acknowledges that accomplice liability may accrue even though it was not the actor's purpose to commit an offense. It applies when an essential element of an offense is causing a particular

result. The offenses most likely to be affected are homicide, where causing a death is an essential element, and battery, where causing physical injury is an essential element. Subsection (b) imposes liability on the person who acts with respect to a prohibited result with the culpable mental state otherwise required to commit the offense. Its function can be illustrated by the following hypothetical: A loans his

automobile to B, who is intoxicated and obviously incapable of driving. B strikes and kills a pedestrian. B is not an accomplice to the homicide under subsection (1) since he did not intend to cause the death of anyone. However, A would be guilty as an accomplice to negligent homicide (§ 5-10-105), or manslaughter (§ 5-10-104), if the jury determined that he was negligent or reckless with respect to the death.

1988 Supplementary Commentary to § 5-2-403

None of these sections has been amended. Their functions are described in the original commentary to §§ 5-2-401 to 5-2-403.

Basis of Accomplice Liability

The cases disclose only one development that might be characterized as surprising. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1979), upholding the conviction of appellant for first degree battery upon her ten-month old daughter, contains language which could be misread to hint at broad liability based upon knowledge of circumstances constituting an offense:

The first error alleged is a lack of evidence to support the jury's finding of guilt. At the time of the alleged abuse, Gloria Williams was living with a man named Grady Madison. The medical testimony was that the child had suffered from child abuse. Williams denied abusing the child in any way and suggested that perhaps the child had fallen, or as Madison told her, that she had been burned from boiling water. Most of the evidence was circumstantial but *there was sufficient evidence to support the jury's findings that Williams had abused the child*. We no longer distinguish between an accessory and the principal, Ark. Stat. Ann. § 41-301, *et seq.* (Repl. 1977) (§ 5-2-401), *and there is no doubt that she could not have been around the child without knowing of the injuries*. Compare, *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978). Furthermore, *there is some evidence that she may have injured the child herself*. For example, Madison testified that she grabbed the child up by an arm and a leg *on one occasion*.

Id. at 528-29, 593 S.W.2d at 9.

Since guilt through *knowledge* absent "the purpose of promoting or facilitating the commission of an offense" or "acting with respect to a result with the kind of culpability sufficient for the commission of the offense" has no basis under § 5-2-403, the Court's comment about appellant's "knowledge" is puzzling. One might conclude that the language about knowledge of the child's condition was intended as a comment on the weight of the circumstantial evidence — if she knew her child was injured, why did she not seek medical attention? — were it not for the fact that appellant took the child to a physician for treatment. Nothing in *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978), relied upon by the Court, clarifies the application of § 5-2-403 to similar facts there or to those of *Williams, supra*. Compare, *Wilson v. State*, 261 Ark. 820, 552 S.W.2d 223 (1977) (presence, negative acquiescence, and passive failure to disclose crime do not create accomplice liability); *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982) (citing *Wilson, supra* with approval).

Corroboration of Accomplice Testimony: Inchoate Offenses

In *Cate v. State*, 270 Ark. 972, 606 S.W.2d 764 (1980), the Court dealt with the effect of accomplice liability of a witness on appellant's conviction on a conspiracy charge. Appellant was charged with criminal mischief and conspiracy to commit it. He was convicted of the conspiracy charge. On appeal from a decision of the Court of Appeals not designated for publication (269 Ark. at xxvii), the Supreme Court discussed whether a witness called at trial was an "accomplice," pointing out that, if she were, appellant should have been acquitted of the conspiracy charge for lack of corroboration under

Ark. Stat. Ann. § 43-2116 (Repl. 1977). In so finding, the Court held that § 16-89-111 requires corroboration of accomplice testimony to sustain a conviction of a felony grade inchoate offense. Previously, this question did not arise because all conspiracies were misdemeanors. See prior law formerly found at Ark. Stat. Ann. §§ 41-1202 to 1203 (Repl. 1964). Ark. Code Ann. § 16-89-111 permits conviction for a misdemeanor upon the uncorroborated testimony of an accomplice.

Defendant Charged as Principal Convicted as Accomplice

Parker v. State, 265 Ark. 315, 578 S.W.2d 206 (1979) establishes that one charged as a principal has no meritorious objection to evidence showing, instead, that he was an "accomplice" where a proper instruction under § 5-2-403 is given. Also, see *Andrews v. State*, 262 Ark. 190, 555 S.W.2d 224 (1977); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979).

See AMCI 401-403.

Availability of Special Affirmative Defenses

Comment, The Impact of the 1976 Criminal Code on The Law of Accessorial Liability in Arkansas, 31 Ark. L. Rev. 100, 107-110 (1977) raises the question whether a defendant charged under § 5-2-403 as an accomplice to an offense committed under §§ 5-10-101(a)(1), 5-10-102(a)(1), or 5-13-201(a)(4) can raise the special affirmative defenses provided by those sections. The Comment concludes that the accomplice defendant could not because these sections gear these defenses to prosecutions under these sections and points out that a prosecutor can eliminate these defenses by charging under subchapter 2 rather than under chapter 10, for instance. This analysis seems erroneous because even if a defendant is charged as an "accomplice," he must also be charged under the statute defining the substantive offense. Defendants are not prosecutable as accomplices in the abstract.

Liability of Accomplice Distinguished on Basis of Mental State

Savannah v. State, 7 Ark. App. 161, 645 S.W.2d 694 (1983), relying on the commentary to this section, held that one who aids or advises another in the planning or commission of robbery does not, *ipso facto*,

become an accomplice to *aggravated robbery* committed by the person assisted. Where the accomplice can show that the offense ultimately committed by the person assisted was not one the accomplice could have reasonably envisaged, the accomplice can only be convicted of an offense consistent with his mental state. Also, see § 5-2-406 and the supplementary commentary to § 5-12-103.

See AMCI 401, 401-D.

Former Jeopardy Rule Bars Second Trial After Insufficient Corroboration First Trial

The Arkansas Supreme Court has held that dismissal is the only constitutional remedy where the State produces evidence insufficient to convict due to lack of corroboration of an accomplice. *Foster v. State*, 290 Ark. 495, 722 S.W.2d 869 (1987); *Pollard v. State*, 264 Ark. 753, 574 S.W.2d 656 (1978). See, also, *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978).

See Ark. Code Ann. § 16-89-111 (1987).

Accomplice Status Is Question of Fact

Accomplice status is a "mixed question of law and fact, and the issue must be submitted to the jury where there is any evidence to support a jury's finding that the witness was an accomplice. ...The trial court should not instruct the jury that a witness is an accomplice as a matter of law if there is any dispute on that point." *Jones v. State*, 15 Ark. App. 283, 291-B, 695 S.W.2d 386, 387 (1985).

Accomplice vs. Conspiracy Liability

The Arkansas Court of Appeals has ruled that one may be an accomplice to conspiracy. *Strickland v. State*, 16 Ark. App. 293, 701 S.W.2d 127 (1985). Strickland agreed with Howell and Boyce to manufacture methamphetamine, a controlled substance. All contributed money to the scheme. Flaherty, a latecomer, also paid to join the operation. Shortly thereafter he retrieved his money from Strickland at gunpoint. At trial on the charge of conspiracy to manufacture a controlled substance, Flaherty was held not to be an accomplice, and Strickland was convicted on the testimony of Flaherty and others. On appeal, Strickland contended that Flaherty was a co-conspirator and an accomplice. The Court of Appeals agreed and reversed the

conviction on grounds of lack of corroboration.

As for the conspiracy charge, the court held that Flaherty joined the conspiracy by contributing money and agreeing to participate, the payment being the requisite overt act. Ark. Code Ann. § 5-3-401 (1987). Retrieving the money was found insufficient to establish renunciation under Ark. Code Ann. § 5-3-405 (1987).

The court then stated that Flaherty did not withdraw *as an accomplice* when he retrieved his money, holding that "Flaherty became an accomplice to the crime of conspiracy when he agreed to join the conspiracy and provided the funds for the accomplishment of its purpose." *Id.* at 297, 701 S.W.2d at 129. Having become an accomplice, Flaherty could establish the § 5-2-404(b) defense only by "terminating his complicity *prior to the commission of the offense...*" (§ 5-2-404(b)), the court said. The court interpreted the language "the offense" to mean the conspiracy, not the substantive drug offense that was the object of the conspiracy. Since the conspiracy was ongoing, Flaherty could not possibly terminate his complicity prior to its commission and therefore could not establish the § 5-2-404(b) renunciation defense to the accomplice charge. Under this reading of the statute, one who joins a conspiracy will *never* be able to renounce and avoid accomplice liability. The Legislature did not intend this result, the purpose of a renunciation provision being to provide an incentive for changing heart.

The Court's decision on accomplice liability turns on the language "the offense" in Ark. Stat. Ann. § 41-305 [§ 5-2-404] and in Ark. Stat. Ann. § 41-303(1) [§ 5-2-403]. The latter defines accomplice liability:

- (a) A person is an accomplice of another person in the commission of *an offense* if, with the purpose of promoting or facilitating the commission of *an offense*, he:
 - (1) Solicits, advises, encourages, or coerces the other person *to commit it*; or
 - (2) Aids, agrees to aid, or attempts to aid the other person in *planning or committing it...*

The statute imposes accomplice liability upon one person for the criminal conduct of another. It speaks in terms of completed offenses. Normally, one is not an accom-

plice to an offense if, despite his encouragement, no offense is committed. The "offense" aimed at is the substantive defense the parties agree to commit. For example, if A agrees to aid B to manufacture and sell drugs, A has no criminal liability on an accomplice theory unless B actually commits the offense planned. "An offense" is broad enough to cover lesser included and greater inclusive offenses as "offenses that follow directly and immediately in the execution of the common purpose as one of its probable and natural consequences." *Clark v. State*, 169 Ark. 717, 727, 276 S.W. 849, 853 (1925). See, also, *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970); *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985); § 5-2-405(2) (convictions of different offenses and degrees of offenses); § 5-2-406. Subsection 5-2-403(b) governs accomplice liability for crimes such as homicide defined in terms of prohibited results.

In *Strickland* the Court of Appeals held that the "offense" Flaherty was intent on promoting was the conspiracy, not the drug offense that was its object. In other words, the court held that by agreeing to aid his confederates in a drug manufacturing scheme Flaherty satisfied the statute's "promoting or facilitating the commission of *an offense*" requirement (§ 5-2-403(a)), the "offense" being the conspiracy. Clearly, though, Flaherty's intent for § 5-2-403 and § 5-2-404(b) purposes was to manufacture and sell drugs, not to "facilitate the commission of" a conspiracy. Flaherty did not agree to aid anyone to commit "the offense" of conspiracy: he agreed to help manufacture and sell methamphetamine.

It is suggested that a better reading of § 5-2-403 in *Strickland* would have required proof that the drug offense or a related offense took place as a prerequisite for accomplice liability. It seems anomalous to hold that the same acts and mental states made Flaherty a member of a conspiracy *and* an accomplice to the same conspiracy under circumstances such that renunciation was a legal impossibility. This is not to say that there can never be accomplice liability based on an inchoate offense. One can be an accomplice to an attempt. If A and B agree to murder C, and B attempts unsuccessfully to murder C, than A is an accomplice to attempted murder. But if after the agree-

ment and an overt act no conduct constituting a separate offense occurs, A and B are co-conspirators, not accomplices. It distorts the purpose of the accomplice statute to hold that A is an *accomplice* of B with respect to the conspiracy under such circumstances. Since Flaherty terminated

his complicity prior to the commission of the offense of manufacturing drugs, the court could have held that he had established the affirmative defense provided by § 5-2-404(b)(1). See, also, *Model Penal Code and Commentaries*, American Law Institute § 2.06 at 295-313, 326 (1985).

Original Commentary to § 5-2-404

Section 5-2-404 makes available certain defenses that relieve one person of accessorial liability for the conduct of another. The discussion of the rationale underlying subsection (1) found at *M.P.C. § 204, Comment at 35-38 (Tent. Draft No. 1, 1953)* is here excerpted:

“(a) It seems clear that the victim of a crime should not be held as an accomplice in its perpetration, though his conduct in a sense assists in the commission of the crime. The business man who yields to the extortion of a racketeer, the parent who paid ransom to the kidnapper, may be unwise or even may be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the provisions; it is laid down, wholly or in part, for their protection. So, too, to hold the female an accomplice in a statutory rape on her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime.

“(b) Exclusion of the victim does not wholly meet the problems that arise. Should a woman be deemed an accomplice when an abortion is performed upon her? Should the man who has intercourse with a prostitute be viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamist marriage an accomplice of the bigamist, the bribe giver an accomplice of the taker?

“These are typical situations where conflicting policies and strategies, or both, are involved in determining whether the normal principles of accessorial accountability ought to apply. One factor that has weighed with some state courts is that affirming liability makes applicable the requirement that testimony be corroborated; the consequence may be to diminish rather than enhance the law’s effectiveness by making any convictions unduly

difficult. More than this, however, is involved. In situations like prostitution, prohibition, even abortion, there is an ambivalence in public attitude that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchical diversity and enlists sympathy for those against whom prosecution may be launched.

“To seek a systematic legislative resolution of these issues seems a hopeless effort; the problem must be faced and weighed as it arises in each situation. What is common to these cases is, however, that the question is before the legislature when it defines the individual defense involved. No one can draft a prohibition of ‘adultery’ without awareness that two parties to the conduct necessarily be involved. It is proposed, therefore, that in such cases the general section on complicity be made inapplicable leaving to the definition of the crime itself the selective judgment that must be made. If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to behavior ‘inevitable incident to’ the commission of the crime, the problem, we repeat, inescapably presents itself in defining the crime.

“This method of treatment might be unacceptable in legislating on accomplices for an established system, where the legislature may or may not have dealt with the issue in particular definitions and will not have been consistent in its practice. But in a model code or general revision, former legislative practice appears immaterial; the problem may be faced as each branch of the work proceeds.”

So, under § 5-2-404, unless the defini-

tion of the crime provides otherwise, a "victim" does not become an accomplice because of whatever aid he might have rendered in the commission of the offense. The same protection is extended by § 5-2-404(a)(2) to persons who are not victims but whose conduct is inevitably incident to the commission of the offense. Perhaps the most common effect of this subsection will be to relieve the undercover law enforcement officer of accomplice liability for conduct designed to procure evidence — e.g., purchasing drugs. See, also, 30 Am.Jur.2d Evidence § 1150 (Feigned Accomplices) (1967); § 5-2-603(1); and *Commentary, infra*.

Subsection (b) provides an affirmative defense. One who has already engaged in conduct sufficient to create accomplice liability upon the occurrence of the offense

may in the time interval before its commission avoid liability, but only in the explicitly designated fashions set out disjunctively by (b)(1)-(c).

First he may deprive his complicity of effectiveness. This might be accomplished in a number of ways, depending on the offense involved. If he has agreed to drive the getaway car, he must announce to his cohorts that the deal is off. If, on the other hand, he has provided weapons, he must get them back.

Otherwise, he must either give *timely* notice to appropriate law enforcement authorities or make some other good faith effort to prevent the crime's commission. What sort of effort will suffice is difficult of articulation in statutory form. Consequently, this aspect of the defense is left to judicial interpretation and definition.

1988 Supplementary Commentary to § 5-2-404

Judicial interpretations of this section are in accord with the original commentary. See, for example, *Brizendine v. State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982) (drug purchaser not accomplice of seller). Also, to the same effect, see *Long v. State*, 260 Ark. 417, 542 S.W.2d 742 (1976).

Section 5-2-404(a)(2) Exception Not Nullified by Allegation of Bias

In *Brizendine v. State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982), the Court was apparently asked to find § 5-2-404(a)(2) inapplicable in determining the accomplice liability of a drug purchaser who was an undercover police officer, but theory being that an officer's "bust record" and the possibility of promotion prevent him from being a disinterested witness. The Court, relying upon *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971) and § 5-2-603(a) as well as the commentary thereto, rejected appellant's arguments after considering public policy and the legislative intent underlying the section.

See AMCI 4101.

"Victim" and "Inevitably Incident" Exclusions

In *Camp v. State*, 288 Ark. 269, 704 S.W.2d 617 (1986), the Court affirmed the incest conviction of appellant for having sexual intercourse with his sixteen year old stepdaughter. Appellant argued that his stepdaughter consented. This being

the case and because she was sixteen years old, she could have also been charged with incest under Ark. Code Ann. § 5-26-202 (1987), he contended. Therefore, he argued, she was an accomplice whose testimony must be corroborated under Ark. Code Ann. § 16-89-111 (1987). Finding that the evidence justified the conclusion that the stepdaughter did not consent, the Court dismissed appellant's arguments in this regard, concluding that she was a victim under § 5-2-404(a)(1). The court did not go further to indicate what it would have concluded had it found that the sixteen-year-old stepdaughter consented. In particular, the Court did not indicate whether, based on the age differential and the lesser culpability of a sixteen-year-old, it would be appropriate to find that her conduct was "inevitably incident" to the commission of the offense and hold that she was not an accomplice. § 5-2-404(a)(2). Also, see original commentary.

Accomplice vs. Conspiracy Liability

The Arkansas Court of Appeals has ruled that one may be an accomplice to conspiracy. *Strickland v. State*, 16 Ark. App. 293, 701 S.W.2d 127 (1985). Strickland agreed with Howell and Boyce to manufacture methamphetamine, a controlled substance. All contributed money to the scheme. Flaherty, a latecomer, also paid to join the operation. Shortly there-

after he retrieved his money from Strickland at gunpoint. At trial on the charge of conspiracy to manufacture a controlled substance, Flaherty was held not to be an accomplice, and Strickland was convicted on the testimony of Flaherty and others. On appeal, Strickland contended that Flaherty was a co-conspirator and an accomplice. The Court of Appeals agreed and reversed the conviction on grounds of lack of corroboration.

As for the conspiracy charge, the court held that Flaherty joined the conspiracy by contributing money and agreeing to participate, the payment being the requisite overt act. Ark. Code Ann. § 5-3-401 (1987). Retrieving the money was found insufficient to establish renunciation under Ark. Code Ann. § 5-3-405 (1987).

The court then stated that Flaherty did not withdraw *as an accomplice* when he retrieved his money, holding that "Flaherty became an accomplice to the crime of conspiracy when he agreed to join the conspiracy and provided the funds for the accomplishment of its purpose." *Id.* at 297, 701 S.W.2d at 129. Having become an accomplice, Flaherty could establish the § 5-2-404(b) defense only by "terminating his complicity prior to the commission of the offense..." (§ 5-2-404(b)), the court said. The court interpreted the language "the offense" to mean the conspiracy, not the substantive drug offense that was the object of the conspiracy. Since the conspiracy was ongoing, Flaherty could not possibly terminate his complicity prior to its commission and therefore could not establish the § 5-2-404(b) renunciation defense to the accomplice charge. Under this reading of the statute, one who joins a conspiracy will *never* be able to renounce and avoid accomplice liability. The Legislature did not intend this result, the purpose of a renunciation provision being to provide an incentive for changing heart.

The Court's decision on accomplice liability turns on the language "the offense" in Ark. Stat. Ann. § 41-305 [§ 5-2-404] and in Ark. Stat. Ann. § 41-303(1) [§ 5-2-403]. The latter defines accomplice liability:

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coerces the other person to *commit it*; or

- (2) Aids, agrees to aid, or attempts to aid the other person in *planning or committing it*...

The statute imposes accomplice liability upon one person for the criminal conduct of another. It speaks in terms of completed offenses. Normally, one is not an accomplice to an offense if, despite his encouragement, no offense is committed. The "offense" aimed at is the substantive offense the parties agree to commit. For example, if A agrees to aid B to manufacture and sell drugs, A has no criminal liability on an accomplice theory unless B actually commits the offense planned. "An offense" is broad enough to cover lesser included and greater inclusive offenses as "offenses that follow directly and immediately in the execution of the common purpose as one of its probable and natural consequences." *Clark v. State*, 169 Ark. 717, 727, 276 S.W. 849, 853 (1925). See, also, *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970; *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985); § 5-2-405(2) (convictions of different offenses and degrees of offenses: § 5-2-406. Subsection 5-2-403(b) governs accomplice liability for crimes such as homicide defined in terms of prohibited results.

In *Strickland* the Court of Appeals held that the "offense" Flaherty was intent on promoting was the conspiracy, not the drug offense that was its object. In other words, the court held that by agreeing to aid his confederates in a drug manufacturing scheme Flaherty satisfied the statute's "promoting or facilitating the commission of *an offense*" requirement (§ 5-2-403(a)), the "offense" being the conspiracy. Clearly, though, Flaherty's intent for § 5-2-403 and § 5-2-404(b) purposes was to manufacture and sell drugs, not to "facilitate the commission of" a conspiracy. Flaherty did not agree to aid anyone to commit "the offense" of conspiracy: he agreed to help manufacture and sell methamphetamine.

It is suggested that a better reading of § 5-2-403 in *Strickland* would have required proof that the drug offense or a related offense took place as a prerequisite for accomplice liability. It seems anomalous to hold that the same acts and mental states made Flaherty a member of

a conspiracy *and* an accomplice to the same conspiracy under circumstances such that renunciation was a legal impossibility. This is not to say that there can never be accomplice liability based on an inchoate offense. One can be an accomplice to an attempt. If A and B agree to murder C, and B attempts unsuccessfully to murder C, than A is an accomplice to attempted murder. But if after the agreement and an overt act no conduct constituting a separate offense occurs, A and B

are co-conspirators, not accomplices. It distorts the purpose of the accomplice statute to hold that A is an *accomplice* of B with respect to the conspiracy under such circumstances. Since Flaherty terminated his complicity prior to the commission of the offense of manufacturing drugs, the court could have held that he had established the affirmative defense provided by § 5-2-404(b)(1). See, also, *Model Penal Code and Commentaries*, American Law Institute § 2.06 at 295-313, 326 (1985).

Original Commentary to § 5-2-405

This section follows prevailing authority by foreclosing lines of defense logically unrelated to the question of the actor's accomplice liability.

Subsection (1) states the proposition that one who is himself legally incapable of committing an offense as a "principal" may incur accomplice liability through the conduct of another who can commit the crime. For example, one who aids two relatives to enter an incestuous marriage can be convicted of incest (§ 5-26-202), notwithstanding that he is incapable of committing the offense in an individual capacity because he is not personally within one of the prohibited degrees of relationship.

Subsection (2) is congruent with the result of *Rush v. State*, 239 Ark. 878, 395

S.W.2d 3 (1965), where prosecution of an accomplice was held not to be barred because the "principals" had been acquitted. See, also, prior authority formerly found at Ark. Stat. Ann. § 41-122 (Repl. 1964). Cf., *Ray v. State*, 102 Ark. 594, 145 S.W. 881 (1912), and *Feaster v. State*, 175 Ark. 165, 299 S.W. 737 (1927), cases decided before the distinction between accessories and principals was abolished by Section 25 of Initiated Measure No. 3 of 1936, previously codified as Ark. Stat. Ann. § 41-118 (Repl. 1964).

The last subsection prevents an accomplice from escaping liability merely because the person actually committing the offense is himself, for example, insane or not accountable by virtue of another legal immunity.

1988 Supplementary Commentary to § 5-2-405

Roleson v. State, 277 Ark. 148, 640 S.W.2d 113 (1982) (evidence of judgment dismissing prosecution against accomplice inadmissible at trial of appellant) interprets the language of § 5-26-202 as well as legislative intent expressed by the original commentary to completely foreclose admission of evidence to circumvent the statute's purpose of closing the loophole left open by cases such as *Ray v. State*, 102 Ark. 594, 145 S.W. 881 (1912) (no accomplice liability where principal acquitted).

For a case presenting the converse situation, see *Riddick v. State*, 271 Ark. 203, 607 S.W.2d 671 (1980), where appellant "principal" unsuccessfully argued that he could not be convicted of arson because he committed the offense at the "accomplice" property owner's request as his "agent."

Appellant was convicted under the original Code arson provision which applied only to conduct by persons other than the owner of the occupiable structure burned. He argued that he had been hired by the owner to burn the property and contended that one who commits arson at the owner's request could not be convicted of the offense because the owner could not be convicted of it. The Court did not discuss accomplice liability under the Code. It found instead that the jury had reasonably concluded that the offense was not committed at the owner's instance. However, the Court went on to distinguish the facts of *Riddick* from those of *State v. Christendon*, 205 Kan. 28, 468 P.2d 153 (1970), relied upon by appellant:

Appellant insists that since one of the elements of an arson conviction is that

the property be that of another, an owner cannot be found guilty of arson in the burning of his own building; therefore, anyone who commits the offense at the owner's request, as his agent, cannot be guilty of arson. To support his conviction appellant relies on a single Kansas case, *State v. Christendon*, 205 Kan. 28, 468 P. 2d 153 (1970). In that case the owner of the burned structure had admitted hiring Christendon for the purpose of committing arson. The owner, himself, had been convicted of third degree arson and insurance arson. Christendon's prosecution for first degree arson was dismissed by the trial judge on the grounds that as the owner's agent, Christendon could not be convicted of a higher crime than his principal. On the basis of the uncontroverted fact that Christendon was the owner's agent in burning the structure, the Kansas Supreme Court affirmed. The facts in Christendon are easily distinguished from those involved here. There the owner had already been convicted and had admitted that the Christendon was his agent, there was

no question that Christendon was the owner's agent; here, Frank Hamilton, the owner of the Circle Inn Restaurant, took the stand on rebuttal and emphatically denied soliciting either Riddick or Leroy Dirlam to burn his restaurant. Since it cannot be said that the owner's participation is an uncontroverted fact, we cannot say that Christendon is controlling.

Riddick at 204, 607 S.W.2d at 672. This language seems to indicate that had the jury convicted appellant under circumstances where there was no denial by the owner of complicity a different result might have been reached.

Some jurisdictions still recognize collateral estoppel defenses in cases where a defendant's guilt is predicated on his vicarious liability for acts of a previously acquitted accomplice. It is now settled beyond doubt that Arkansas law is to the contrary Ark. Code Ann. § 5-2-404(2) (1987). *Jared v. State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986).

Original Commentary to § 5-2-406

This section provides that where an actor is sought to be subjected to accomplice liability for conduct of another, and the conduct alleged may give rise to differing degrees of the same offense depending on an attendant culpable mental state, the accomplice-actor is subject only to that liability consistent with his own culpable mental state. This, of course, does not preclude a finding that both principal and accomplice are guilty of the same degree of the offense. Former law appears to be in accord. See, for example, *Bosnick v. State*,

248 Ark. 846, 454 S.W.2d 311 (1970), where the court recognized that with regard to allocation of responsibility among coconspirators, "by the decided weight of authority, and by what we regard as the better rule, the jury may assign degrees of guilt among the conspirators in accordance with their respective culpability." *Id.* at 850, 454 S.W.2d at 314. For further discussions of the problems in this area, see *State v. Shon*, 47 Haw. 158, 180, 385 P.2d 830, 842 (1963) (dissenting opinion of Mizuha, J.).

1988 Supplementary Commentary to § 5-2-406

There have been no significant developments regarding this section since the enactment of the Code. See, however, *Savannah v. State*, 7 Ark. App. 161, 645

S.W.2d 694 (1983) (distinguishing degree of accomplice liability on basis of mental state).

Original Commentary to § 5-2-501

This chapter indicates the circumstances under which an organization can be held liable for conduct of persons authorized to act in its behalf. It also deals with the individual liability of organiza-

tion agents for conduct performed in behalf of organizations.

Section 5-2-501 provides definitions. "Organization" is defined broadly in a fashion inspired by S. 1400, 93d Cong., 1st

Sess. § 111 (1973). See, also, S. — (Criminal Justice Codification, Revision, and Reform Act), 93d Cong., 2d Sess. § 111 (1974). The term agent is defined as it is in Proposed Michigan Code § 430. The definition of "high managerial agent" is drawn from Vern. Texas Code Ann. § 7.21 (Repl.

1974). The definitions of "agent" and "high managerial agent" describe the persons whose conduct may generate liability on behalf of an organization. Because an organization may assume numerous forms, both definitions are, of necessity, cast in rather general terms.

Original Commentary to § 5-2-502

Law concerning the criminal liability of organizations is of comparatively recent origin, its development having been inhibited by both procedural and conceptual difficulties. For example, the development of this area of the law was at one time characterized by the notion that organizations, especially corporations, cannot commit crimes defined in terms of "specific intent" or purpose. See, generally, 19 C.J.S. "Corporations," §§ 1358 et seq.; M.P.C. § 2.07, *Comment at 146* (Tent. Draft No. 4, 1955).

There is presently no single comprehensive general statute dealing with criminal liability of organizations. Moreover, Arkansas cases are scarce indeed. See, *Lindsey v. Rottaken*, 32 Ark. 619, 637 (1878):

"[T]he punishment [for an offense] . . . must necessarily fall on the officers of [a] corporation, because a corporation is an ideal being, and cannot be indicted, fined and imprisoned."

See, also, *Sanderfur-Julian Co. v. State*, 72 Ark. 11, 77 S.W. 596 (1903). Cf., *Van Horne v. State*, 5 Ark. 349 (1844). This chapter is designed to fill this virtual void. As a prefatory matter, the *Commentary* to M.P.C. § 2.07, although directed only to the issue of corporate liability, is enlightening:

"In approaching the analysis of corporate criminal capacity, it will be observed initially that the imposing of criminal penalties on corporate bodies results in a species of vicarious criminal liability. The direct burden of a corporate fine is visited on the shareholders of the corporation. In most cases, the shareholders have not participated in the criminal conduct and lack the practical means of supervision of corporate management to prevent misconduct by corporate agents. This is not to say, of course, that all the considerations of policy which are involved in imposing vicarious responsibility on the human

principal are present in the same degree in the corporate cases. Two fundamental distinctions should be noted. First, the very fact that the corporation is the party nominally convicted means that the individual shareholders escape the opprobrium and incidental disabilities which normally follow a personal conviction or those which may result even from being named in an indictment. Second, the shareholder's loss is limited to his equity in the corporation. His personal assets are not ordinarily subject to levy and the conviction of the corporation will not result in loss of liberty to the stockholders. Nevertheless, the fact that the direct impact of corporate fines is felt by a group ordinarily innocent of criminal conduct underscores the point that such fines ought not to be authorized except where they clearly may be expected to accomplish desirable social purposes. To the extent that shareholders participate in criminal conduct, they may be reached directly through application of the ordinary principles of criminal liability.

"It would seem that the ultimate justification of corporate criminal responsibility must rest in large measure on an evaluation of the deterrent effects of corporate fines on the conduct of corporate agents. Is there reason for anticipating a substantially higher degree of deterrence from fines levied on corporate bodies than can fairly be anticipated from proceeding directly against the guilty officer or agent or from other feasible sanctions of a non-criminal character?"

"It may be assumed that ordinarily a corporate agent is not likely to be deterred from criminal conduct by the prospect of corporate liability when, in any event, he faces the prospect of individually suffering serious criminal penalties for his own act. If the agent cannot be prevented from committing an offense by the prospect of personal liability, he ordinarily will not be

prevented by the prospect of corporate liability.

"Yet the problem cannot be resolved so simply. For there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain, especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates. This tendency may be particularly strong where the individual knows that his guilt may be difficult to prove or where a favorable reaction to his position by a jury may be anticipated even where proof of guilt is strong. A number of appellate opinions reveal situations in which juries have held the corporate defendant criminally liable while acquitting the obviously guilty agents who committed the criminal acts. See, e.g., *United States v. General Motors Corp.*, 212 F.2d 376, 411 (7th Cir. 1941) ("We cannot understand how the jury could have acquitted all of the individual defendants."); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir. 1929) ("How an intelligent jury could have acquitted any of the defendants we cannot conceive."); *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942).

"This may reflect more than faulty or capricious judgment on the part of the juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated. Furthermore, the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy. In some cases, such as the Elkins Act, legislatures have added corporate liability to the criminal penalties on the belief founded on experience, that such additional sanctions are necessary.

New York Cent. R.R. v. United States, 212 U.S. 481, 494-495, 29 S. Ct. 304, 53 L. Ed. 613 (1909).

"The case so made out, however, does not demonstrate the wisdom of corporate fines generally. Rather, it tends to suggest that such liability can best be justified in cases in which penalties directed to the individual are moderate and where the criminal conviction is least likely to be interpreted as a form of social moral condemnation. This indicates a general line of distinction between the "malum prohibitum" regulatory offenses, on the one hand, and more serious offenses, on the other. The same distinction is suggested in dealing with the problem of jury behavior. The cases cited above involving situations in which individual defendants were acquitted are all cases of economic regulations. It may be doubted that such results would have followed had the offenses involved a more obvious moral element. In any event, it is not clear just what conclusions are to be drawn from the cited cases. In each, the jury had corporate liability available as an alternative to acquittal of all the defendants. Conceivably, if that alternative had not been available, verdicts against the individuals in some of the cases might have been returned. Thus, it is at least possible that corporate liability encourages erratic jury behavior. It may be true that the complexities of organization characteristic of large corporate enterprise at times present real problems of identifying the guilty individual and establishing his criminal liability. It would be hoped, however, that more could be pointed to in justification of placing the pecuniary burdens of criminal fines on the innocent than the difficulties of proving the guilt of the culpable individual. Where there is concrete evidence that the difficulties are real, however, the effectuation of regulatory policy may be thought to justify the means.

"In surveying the case law on the subject of corporate criminal liability one may be struck at how few are the types of common-law offenses which have actually resulted in corporate criminal responsibility. They are restricted for the most part to thefts (including frauds) and involuntary manslaughter. Conspiracy might also be included, but generally the cases have involved conspiracies to violate regulatory statutes (such as the anti-trust laws), and

often these statutes include specific conspiracy provisions made applicable to corporate bodies. No cases have been found in which a corporation was sought to be held criminally liable for such crimes as murder, treason, rape, or bigamy. In general, such offenses may be effectively punished and deterred by prosecutions directed against the guilty individuals. One would not anticipate the same reluctance on the part of juries to convict which seems sometimes to be present where the offense is a regulatory crime. Moreover, in many of the situations, such as those involving involuntary manslaughter, there is a strong possibility that the shareholders will be called upon to bear the burden of tort recoveries. The prospect of tort recoveries may also be expected to encourage supervision of subordinate employees by executive personnel." *M.P.C. § 2.07, Comment at 148-150 (Tent. Draft No. 4, 1955).*

Section 5-2-502 sets out with as much precision as is practicable the circumstances in which an organization may be held criminally accountable. The section,

Original Commentary to § 5-2-503

Section 5-2-503 ensures that the organization agent engaging in conduct constituting an offense will not escape individual liability merely because his conduct was performed on behalf of the organization. The dangers avoided by precluding such a defense are pointed out in the *Commentary* to M.P.C. § 2.07:

"The difficulties are illustrated by the case of *People v. Strong*, 363 Ill. 602, 2 N.E. 2d 942 (1936). Officers and directors were individually indicted for embezzlement because of the failure of the corporation to turn over to the state certain taxes collected by the company. The state statute provided only imprisonment as a penalty for embezzlement. The officers, says the Illinois Supreme Court, 'were not principals, because they neither received or possessed the tax money and they can

by virtue of the nature of organizational composition, speaks chiefly in terms of conduct by specified classes of individuals.

Subsection (a)(1) affirms criminal responsibility for failure to perform statutorily mandated duties.

Subsection (a)(2) speaks in respondeat superior terms. Only conduct authorized, commanded, or recklessly acquiesced in by either a board of directors or similar executive board, or by a high managerial agent acting within the scope of his employment, will suffice to create organizational liability.

Under subsection (a)(3), criminal liability flows from acts of a mere "agent" if the conduct involved constitutes only a misdemeanor or violation. Felony liability results from such conduct only if corporate accountability is manifestly imposed by the definition of the offense.

Subsection (b) is designed to make it clear that the chapter's comprehensive scheme may be modified by, and is generally subject to, legislation dealing specially with particular circumstances.

not be accessories because no one can aid or abet a corporation in the commission of a crime of which the corporation is incapable. Without a principal there are no accessories.' [This] provision . . . avoids such substantial failures of justice." *M.P.C. § 207, Comment at 155 (Tent. Draft No. 4, 1955).*

Subsection (b) is concerned with individual omissions to discharge duties statutorily imposed on organizations. The grading reference in the last sentence of the subsection recognizes the inequity that would arise were the individual offender to be subjected to the enhanced fines geared to deterring proscribed organizational acts or omissions. The convicted individual defendant, accordingly, may be subjected only to penalties that may be imposed for individual conduct.

Original Commentary to § 5-2-601

Section 5-2-601 defines terms of importance in the succeeding sections.

The manner in which "common carrier" is used in § 5-2-605 requires that it be defined in terms of a type of vehicle rather than as a kind of organization.

"Dwelling" is a term of significance in § 5-2-607, dealing with the justifiable use of physical force in defense of a person. Because of the increasingly mobile nature of society and resurgent interest in outdoor activities, it is here provided with a definition sufficiently broad to encompass tents and camping vehicles.

The definition of "physical force" is drawn from the Proposed Hawaii Code. It is likewise cast in broad language to include restraint, confinement, and threats of "physical force."

"Unlawful physical force" is a concept of

pervasive importance to the chapter: it designates that behavior against which protective force may be employed.

"Deadly physical force" is defined in terms of "physical force" and, so, incorporates the concepts of restraint, confinement, and threat.

"Premises" is defined in the alternative as either an "occupiable structure" or "any real property." Of course, most such "structures" will themselves be real property. The form of the definition is necessitated by the fact that "occupiable structure" is defined broadly enough to include "vehicles," when the latter are used for human habitation. See, § 5-39-101(1).

"Vehicle" is defined here as in § 5-39-101(4) to include not only automobiles and trucks, but also boats and planes.

Original Commentary to § 5-2-602

Section 5-2-602 provides that justification is a defense to prosecution. This has the effect of requiring the prosecution to negate the defense beyond a reasonable doubt once evidence tending to support the defense has been adduced either by the state or the defendant. See, § 5-1-111(c).

Arkansas law was apparently in accord. See, e.g., prior authority previously found at Ark. Stat. Ann. §§ 41-2245, 2246 (Repl. 1964). See, also, *Mode v. State*, 231 Ark. 477, 330 S.W. 2d 88 (1959); *Cogburn v. State*, 76 Ark. 110, 88 S.W. 822 (1905). Cf.,

Robertson v. Sisk, 115 Ark. 461, 171 S.W. 880 (1914) (burdens of going forward and proof respecting justification in context of civil assault and battery action).

This subchapter and Act 928 of 1975 abrogate a great deal of the statutory authority establishing defenses to prosecutions grounded, for example, on the use of force. However, subchapter 6 is not an exhaustive statement of the law on the subject; cases recognizing "justification" defenses not inconsistent with Code provisions are still authoritative.

Original Commentary to § 5-2-603

This section has been adopted in modified form from Proposed Oregon Code § 19 and M.P.C. § 3.03. It merely provides, in the first instance, that if conduct is actually authorized or compelled by court order or law, the actor has a complete defense to prosecution. In addition, the reasonable exercise of official powers, duties, or functions by either a public servant or a person acting at his direction may be asserted as a defense. "Public servant" here has the meaning provided by § 5-1-102(16). "Conduct," in turn, is defined by § 5-2-201(3). The clause in subsection (a), beginning "is performed

by," covers situations where official conduct is accepted as proper and appropriate but is not expressly "authorized or required" by law. For example, no statute explicitly authorizes a law enforcement officer to purchase narcotics as part of an investigation of criminal drug traffic. Consequently, while it is unlikely in the extreme that a policeman would be criminally prosecuted for such conduct, the Commission opted to relax the strict requirements imposed by the language "authorized by law or judicial decree."

Subsection (b) permits successful assertion of the defense to charges respecting

conduct not actually authorized or required by law or judicial decree. Justification may be established by a showing of the actor's reasonable belief that his conduct was so authorized by the judgment or direction of a competent court or other tribunal, even if the tribunal was, in fact, without jurisdiction. The same reasonable belief protects the person assisting a public servant.

No provision of general application such as § 5-2-603 was found in former Arkansas law, although there were a number of statutes "justifying" conduct under specified circumstances. See, e.g., previous authority formerly found at Ark. Stat. Ann. §§ 41-2237 to 2239 (Repl. 1964).

1988 Supplementary Commentary to § 5-2-603

Section 5-2-404(a)(2) Exception Not Nullified by Allegation of Bias

In *Brizendine v. State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982), the Court was apparently asked to find § 5-2-404(a)(2) inapplicable in determining the accomplice liability of a drug purchaser who was an undercover police officer, the theory being that an officer's "bust record" and the

possibility of promotion prevent him from being a disinterested witness. The Court, relying upon *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971) and § 5-2-603(a) as well as the commentary thereto, rejected appellant's arguments after considering public policy and the legislative intent underlying the section.

See AMCI 4101.

Original Commentary to § 5-2-604

Under § 5-2-604, conduct that would ordinarily be criminal may be excused because of extraordinary attendant circumstances. The section proceeds by a process that essentially requires comparing the injury the actor caused with the injury he sought to prevent.

Illustrative of situations that might permit successful recourse to § 5-2-604 are: (1) the destruction of buildings or other structures to keep fire from spreading; (2) breaking levees to prevent the flooding of a city, causing, in the process, flooding of an individual's property; and (3) temporary appropriation of another person's vehicle to remove a seriously injured person to a hospital.

Subsection (2) indicates that the balancing process is not to take the form of an evaluation of what are thought by the defendant to be the moral implications or the desirability of the statute under which prosecution is instituted. In other words,

one cannot, by virtue of § 5-2-604, "pick and choose" the laws he will obey on the basis of whether he or anyone else deems them morally supportable. See, *Proposed Oregon Code* § 20, *Commentary* at 20.

Lastly, in a case where the actor is culpable with respect to creating the situation necessitating the choice or appraising the necessity for his conduct, subsection (c) removes justification as a defense to a prosecution for an offense requiring for conviction proof of only a reckless or negligent culpable mental state. In such a case, justification remains a defense to a prosecution for an offense requiring proof of a knowing or purposeful culpable mental state. The effect of subsection (c) is to preclude conviction of a crime that can be committed only by intentional conduct if the defendant can show that, although he acted purposely or knowingly, he did so only because of a judgmental error.

1988 Supplementary Commentary to § 5-2-604

Narrow Construction

In *Koonce v. State*, 269 Ark. 96, 598 S.W.2d 741 (1980), the Court noted that the defense of choice of evils was based upon a section of the Model Penal Code. The Court went on to hold that the lan-

guage of § 41-504 was to be "narrowly construed and applied," *Id.* at 101, 598 S.W.2d at 744, and determined that because the evidence bore no similarity to the examples provided by the original commentary to § 5-2-604 or the commen-

tary to the Model Penal Code, the requested instruction (AMCI 4102) was properly refused as "inappropriate to the facts in this case." *Id.* at 102, 598 S.W.2d at 744. The Court made no explicit finding about the weight to be given in future cases to the similarity between the commentary examples and the facts at hand.

Inapplicable in Homicide Prosecutions

In *Peals v. State*, 266 Ark. 410, 584 S.W.2d 1 (1979), where appellant had been convicted of second degree murder, the Court found that "justification as argued under Ark. Stat. Ann. § 41-504 (Repl. 1977) (§ 5-2-604), does not appear to be appropriate in a charge of homicide."

Id. at 418, 584 S.W.2d at 5. In support of this finding the Court noted that there were no cases from any other jurisdiction permitting this defense in a homicide case in which self-defense is also asserted. The section itself does not so limit the scope of the defense. The *Peals* decision is unlikely to lead to results not anticipated by the General Assembly because justification defenses to homicide prosecutions are almost invariably asserted under § 5-2-607 read in conjunction with § 5-2-606. See, *Jones v. State*, 1 Ark. App. 318, 615 S.W.2d 388 (1981).

See AMCI 4102, 4104, 4105.

Original Commentary to § 5-2-605

Section 5-2-605 describes the permissible use of force in the context of common special relationships.

Subsection (1), imposing dual "reasonableness" tests, permits the use of "reasonable and appropriate" force by specified classes of persons when and to the extent "reasonably" necessary. In so providing, this provision follows the thrust of prior law respecting employment of force by teachers, parents, and guardians. See, e.g., *Dodd v. State*, 94 Ark. 297, 126 S.W. 834 (1910) (reversing assault conviction of teacher; setting standard prohibiting unreasonable, arbitrary, malicious, excessive treatment); and *Berry v. Arnold School District*, 199 Ark. 1118, 137 S.W.2d 256 (1940) (upholding school district's firing of teacher for whipping student: "A teacher has the right to inflict reasonable corporal punishment upon a pupil for insubordination, disobedience, or other misconduct, but he has no right to inflict punishment to enforce an unreasonable rule, and the punishment must not be inflicted with such force or in such manner as to cause it to be cruel or excessive.") *Id.* at 1124, 137 S.W. 2d at 259. See, also, prior law formerly found at Ark. Stat. Ann. § 41-1105 (Repl. 1964); Annot., 89 A.L.R. 2d 396 (1963).

Subsection (2) codifies the majority rule and is substantially in accord with pre-existing Arkansas authority respecting the use of force on prisoners in correctional facilities. *Cf.*, Ark. Stat. Ann. § 46-118 (Supp. 1973). See, also, Rule 20 of Arkansas Department of Corrections, Employee Handbook (1972):

"20. Use of Force. Employees are prohibited from striking or laying hands on inmates, parolees or probationers unless it is in defense of themselves or another person, or when necessary to prevent an escape, quell a disturbance or protect State property. Occasionally, but rarely, it is necessary to physically remove an inmate from one place to another. In all cases only the minimum and reasonable amount of force is to be used which is necessary under the circumstances." *Id.* at 35.

Cf. prior law formerly codified as Ark. Stat. Ann. § 41-3102 (Repl. 1964). See, also, *Talley v. Stephens*, 247 F.Supp. 683 (E.D. Ark. 1964); and 60 Am.Jur.2d Penal and Correctional Institutions §§ 42, 43, at 847-849 (1972). It should be noted that this subsection applies only to day-to-day maintenance of order and discipline at correctional facilities. Sections 5-2-606 and -607 permit use of deadly physical force to defend one's self or another from deadly physical force or to prevent the commission of an aggravated felony. Sections 5-2-610 and -613 govern the use of force to prevent escapes from custody or from correctional facilities.

Subsection (3) recognizes that obligations owed by carriers to passengers occasionally necessitate the use of force. The section permits the use of non-deadly force to an extent reasonably necessary to maintain order. *Cf.*, *Citizens Coach Co. v. Wright*, 228 Ark. 1143, 313 S.W. 2d 94 (1958); Ark. Code Ann. §§ 23-10-207, 23-12-708. The defense provided codifies the

majority rule permitting ejectment and the use of force generally but may be broader than the analogous defense in a civil action. *Cf.*, *Little Rock Ry. & Elec. Co. v. Bracy*, 111 Ark. 613, 165 S.W. 450 (1914); and *St. Louis I.M. & S. Ry. Co. v. Osborn*, 67 Ark. 399, 55 S.W. 142 (1900).

Subsection (4) is drawn from the proposed codes of Oregon and Michigan and from M.P.C. § 3.07(5).

Not much statutory or decisional law was found providing physicians with defenses to criminal prosecutions grounded on "therapeutic" use of physical force. The

propriety of imposing criminal liability for improper treatment involving the use of force has been recognized, however. See, e.g., prior authority formerly found at Ark. Stat. Ann. § 41-2222 (Repl. 1964). See, also, *Feige v. State*, 128 Ark. 465, 194 S.W. 865 (1917); *State v. Hardister & Brown*, 38 Ark. 605 (1882). The proposed formulation of § 5-2-605(5) is consonant with recently enacted legislation addressing consent and negligent treatment in a civil context. See, Ark. Stat. Ann. §§ 72-624 (Supp. 1973); 82-363, 364 (Supp. 1973).

Original Commentary to § 5-2-607

Sections 5-2-606 and -607, dealing respectively with the use of physical force and deadly physical force, provide the defense of justification to the person defending himself or a third person from what the actor reasonably believes to be the imminent use of unlawful force. Although § 5-2-606 speaks only to the use of "physical force," its restrictions also apply to the use of "deadly physical force" since the latter term is defined to include the former. The proposed formulation requires that the actor actually have a reasonable belief that the situation necessitates the defensive force employed. Further, the defense is available only to one who acts reasonably in administering such force. To a great extent, the sections codify Arkansas law. *Cf.*, *Gillespie v. State*, 69 Ark. 573, 64 S.W. 947 (1901); *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913); and *Sanders v. State*, 256 Ark. 605, 509 S.W. 2d 295 (1974).

Prior law permitted the use of deadly physical force in defense of another with respect to whom the actor had a "special relationship," but it was unclear whether lethal force could be employed absent such a relationship. See, *Steele v. State*, 194 Ark. 497, 108 S.W. 2d 474 (1937) (cafe proprietor defending patron); *Turner v. State*, 128 Ark. 565, 195 S.W. 5 (1917) (defense of brother); and *Wheatley v. State*, 93 Ark. 409, 125 S.W. 414 (1910) (defense of brother). *Cf.*, *Mabry v. State*, 80 Ark. 345, 97 S.W. 285 (1906) (son defending father); *Cox v. State*, 99 Ark. 90, 136 S.W. 989 (1911) (father defending son); prior law formerly codified as Ark. Stat. Ann. § 41-2234 (Repl. 1964). Al-

though the older, common law view requiring a special relationship still obtains in some jurisdictions, it is abandoned by the Code as too restrictive.

Subsection 5-2-606(a) is drawn more narrowly than M.P.C. § 3.04(1), with the result that the use of protective force is permitted only to prevent the "imminent" use of unlawful force against the actor or another. In so providing, the subsection restates existing law. See, e.g., *Stricklin v. State*, 67 Ark. 349, 56 S.W. 270 (1900).

Subsection 5-2-606(b) withdraws the defense under specified circumstances. Under § 5-2-606(b)(1), as under previous authority, the defense is not allowed where the actor provokes another person to engage in violent conduct if the actor's purpose is to use his antagonist's aggressive conduct as a pretext for injuring or killing him. "He cannot provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense." *Carpenter v. State*, 62 Ark. 286, 306, 307, 36 S.W. 900, 906 (1896). *Cf.*, *Burton v. State*, 254 Ark. 673, 495 S.W. 2d 841 (1973); *Price v. State*, 114 Ark. 398, 170 S.W. 235 (1914); and former law previously found at Ark. Stat. Ann. § 41-2236 (Repl. 1964).

Subsection 5-2-606(b)(2) permits assertion of the justification defense, under narrowly circumscribed circumstances, by an actor who is the original aggressor. Accord, *McKinney v. State*, 140 Ark. 529, 215 S.W. 723 (1919). Compare, *Hadaway v. State*, 215 Ark. 658, 222 S.W.2d 799 (1949).

Subject to the provisions of the preced-

ing subsection, subsection 5-2-606(b)(3) precludes successful assertion of the defense of a person prosecuted for unlawful combat by mutual agreement, for example, dueling.

Section 5-2-607 imposes additional restrictions on the use of deadly physical force. Like § 5-2-606, it is chiefly a codification of Arkansas case law doctrines. Statutory authority regarding protective use of lethal force by a private person was formerly found at Ark. Stat. Ann. §§ 41-2231, 41-2232, 41-2234 to 2236 (Repl. 1964).

Section 5-2-607(a), read in conjunction with § 5-2-606(a), expressly recognizes the justifiability of using deadly force under narrowly confined circumstances. A "reasonable belief" is a prerequisite in all cases. Subsection 5-2-607(a)(1) closely follows previous law which extended the defense to one who used deadly force "in defense of habitation, person, or property against one who manifestly intends or endeavors by violence or surprise, to commit a known felony." Former Ark. Stat. Ann. § 41-2231. See, also, earlier § 41-2234. It will be noted that § 5-2-607(a) does not countenance the use of deadly physical force to prevent a wrongful taking or detention of property if such is not sought to be effected by a felony involving force or violence. See, §§ 5-2-608, -609, *infra*; cf., *Brown v. State*, 149 Ark. 588, 233 S.W. 762 (1921) ("A person has no right to slay another merely to protect his property unless he is in possession and the killing is necessary to prevent the commission of a felony. The mere fact that property is being wrongfully taken or detained would not justify a homicide.") *Id.* at 594, 233 S.W. at 763.

Subsection 5-2-607(a)(2) sanctions the use of lethal force against a person who is himself about to employ unlawful deadly force. Again, the actor must act "reasonably"; the force sought to be averted must

itself be unlawful and deadly. See, *Blaylack v. State*, 236 Ark. 924, 370 S.W. 2d 615 (1963); *Carpenter, supra*; *Nelson v. State*, 249 Ark. 852, 462 S.W. 2d 452 (1971).

Subsection 5-2-607(b) further refines the principles under discussion. The provision conforms to prior authority. See prior law formerly found at Ark. Stat. Ann. § 41-2236 (Repl. 1964). It is well established that "[o]ne who claims self-defense must show not only that the person killed was the aggressor, but that the accused used all reasonable means within his power and consistent with his safety to avoid the killing." *Burton v. State, supra* at 678, 495 S.W. 2d at 844. Under most circumstances "reasonable means" includes retreat where retreat can safely be effected. *Sanders, supra*; *Ford v. State*, 222 Ark. 16, 257 S.W. 2d 30 (1953). Like former law, the Code does not require one to retreat from his own dwelling. *Elder v. State*, 69 Ark. 648, 65 S.W. 938 (1901). Of course, the privilege to use deadly force upon a person unlawfully attempting to enter one's home is not absolute. If deadly force is employed on mere pretext, the defense is not permitted. See, *Hall v. State*, 113 Ark. 454, 168 S.W. 1122 (1914). If the actor was the original aggressor, § 5-2-607(b)(1) withholds the privilege to refrain from retreat as, construably at least, did prior Arkansas law. Cf., *Hart v. State*, 161 Ark. 649, 257 S.W. 354 (1924). Under no circumstances is a law enforcement officer acting as such obliged to retreat in the face of physical force. See, *Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894).

Finally, § 5-2-607(b)(2) comports with prior law by discouraging the use of deadly physical force to settle disputes as to the ownership of property. *Brown, supra*; *Dickerson v. State*, 121 Ark. 564, 181 S.W. 920 (1916).

1988 Supplementary Commentary to § 5-2-607

Evidence That Victim Was Aggressor

It is now well settled that, as pointed out in the original commentary to §§ 5-2-606 and 5-2-607, pivotal to defenses under both sections is the defendant's actual "reasonable belief" that use of force in self-defense was necessary. Questions re-

lating to the defendant's reasonable belief frequently arise when he attempts to offer on direct examination evidence of specific prior acts of the victim to demonstrate that the victim was the aggressor. See, for example, *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983); *Halfacre v. State*,

277 Ark. 168, 639 S.W.2d 734 (1982); *Smith v. State*, 273 Ark. 47, 616 S.W.2d 14 (1981); and *McClellan v. State*, 264 Ark. 223, 570 S.W.2d 278 (1978). These cases apply Rules 404 and 405 of the Arkansas Rules of Evidence, Ark. Code Ann. § 16-41-101, in self-defense cases. Compare, *Pope v. State*, 262 Ark. 476, 557 S.W.2d 887 (1977).

The state of the law with regard to admissibility of evidence of previous violent acts is not entirely clear. Rule 404 provides in pertinent part:

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(2) Character of victim. Evidence of a *pertinent trait of character of the victim of the crime offered by an accused*, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor . . . (Emphasis added.)

Rule 405 provides:

(a) Reputation or Opinion. In all cases in which evidence of a character or a *trait of character* of a person is admissible, proof may be made by *testimony as to reputation* or by *testimony in the form of an opinion*. On cross-examination, inquiry is allowable into relevant *specific instances of conduct*.

(b) Specific Instances of Conduct. In cases in which character or a *trait of character* of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

In *McClellan*, *supra*, the defendant sought to introduce evidence through a defense witness of a previous violent act of decedent known to the defendant. The trial court ruled this evidence inadmissible, and the Supreme Court affirmed. The Supreme Court noted that "Rule 405(a) of the Uniform Rules of Evidence provides that an admissible trait of character may be proved by testimony as to *reputation* or by testimony in the form of an *opinion*." 264 Ark. at 225, 570 S.W.2d at 279. The

Court then observed that under Rule 405(b) where a person's trait of character is "an essential element" of a defense it may be proved by specific instances of conduct. The Court concluded that decedent's alleged aggressive character trait was not an essential element of the defense of self-defense under Rule 405(b). Therefore, the Court held that the trial court had correctly excluded evidence of a specific violent act.

In *Smith v. State*, 273 Ark. 47, 616 S.W.2d 14 (1981) appellant was charged with the murder of his wife and her paramour. Appellant's efforts to introduce evidence of specific prior acts of violence and threats by the victims were thwarted by the trial court's granting of a motion *in limine*. This the Supreme Court held was error, stating:

Evidence of a victim's violent *character*, including *evidence of specific violent acts*, is admissible where a claim of justification is raised. Such evidence is relevant to the issue of who was the aggressor and whether or not the accused reasonably believed he was in danger of suffering unlawful deadly physical force. Rule 404(a) (1) (sic) Arkansas Rules of Evidence (Ark. Stat. Ann. Vol. 3A Repl. 1979). *Pope v. State*, 262 Ark. 476, 557 S.W.2d 887 (1977). The ruling excluding this evidence was erroneous.

Id. at 49, 616 S.W.2d at 15.

Subsequently, in *Halfacre v. State*, 277 Ark. 168, 639 S.W.2d 734 (1982), appellant argued that the trial court erred in not admitting evidence of the victims' specific prior violent acts which were *unknown* to appellant. The Court approved admission of testimony of previous violent acts known to the appellant but found that such evidence was not admissible if appellant was unaware of the previous acts. However, the Court then cited *McClellan*, *supra* in support of its ruling, though *McClellan* had held inadmissible evidence of a specific prior violent act in the context of the defense of self-defense. *Halfacre*, *supra* at 170, 639 S.W.2d at 735-36.

Finally, the Court of Appeals in *Britt v. State*, *supra*, attempted to reconcile the cases by pointing out that in *McClellan* the specific act was committed against a witness, not the defendant as in *Halfacre*.

In any event, the law now appears to be that evidence of specific prior acts of violence committed by the victim are admissible on direct examination of a defense witness if the defendant was aware of these acts at the time of the alleged offense. Laying aside questions about whether Rules 404 and 405 are being correctly interpreted, this rule is clearly compatible with the defenses set out in §§ 5-2-606 and 5-2-607. Because the critical factor in these defenses is the defendant's reasonable belief, general character evidence is simply irrelevant unless the defendant was aware of the victim's character. By the same token, specific prior acts of the victim have relevance only if the defendant knew of them.

See AMCI 4104-4105.

Effect of Recklessly or Negligently Using Force

In *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982), the court found that the trial court did not err in refusing to submit to the jury in a murder prosecution an instruction under § 5-2-614. Citing a concurring opinion in *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977) and the Comment to AMCI 4110, the court

held that "there is no justification if the belief that the use of force is necessary is arrived at recklessly or negligently or the force is excessive." 6 Ark. App. at 430-31, 644 S.W.2d at 299. *Martin, supra*, and AMCI 4110 notwithstanding, *Kendrick* may have been wrongly decided. The unambiguous language of § 5-2-614 and the commentary thereto indicate that it was included in the Code for use in situations where a defendant recklessly or negligently but actually believes that the use of force is necessary.

See AMCI 4104-4105.

"Dwelling" Does Not Include Curtilage

David v. State, 286 Ark. 205, 691 S.W.2d 133 (1985) held that the term "dwelling" in § 5-2-607(b)(1) did not include curtillage. *David v. State* has been followed in *Hopes v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988), although the Court in *Hopes* refrained from deciding whether a front porch was part of a "dwelling" for the purposes of § 5-2-607 because appellant had not raised this issue below. The Court also indicated that enactment of § 5-2-620 neither expanded nor contracted the scope of 5-2-607.

Original Commentary to § 5-2-608

Section 5-2-608 restates pre-existing law, codifying such cases as *Dickerson v. State*, 121 Ark. 564, 181 S.W. 920 (1916), holding that use of deadly physical force is not permitted in defense of premises against criminal trespasses. "Criminal trespass" is a term of art defined by § 5-39-203 as follows:

"A person commits criminal trespass if he purposely enters or remains unlawfully in or upon a vehicle or the premises of another person."

The offense is discussed in detail in the *Commentary* to § 5-39-203, *infra*. Subsection (a) permits a person owning or in control of premises or a vehicle to use non-deadly force to prevent, for example, an itinerant from entering a building or vehicle. The same degree of force may be employed to eject the trespasser who has already taken up occupancy of an automobile or vacant house.

Under subsection (b)(1), a person defending premises may employ deadly physical force in circumstances described by § 5-2-607, the provision of general application respecting use of deadly physical force in defense of a person. Pursuant to subsection (b)(2), one may use deadly physical force to prevent arson or burglary by a trespasser, irrespective of whether the trespass actually poses a risk of death or serious physical injury to anyone. It should be noted that the definition of arson embraces the burning of a vehicle only if the vehicle is an "occupiable structure" as defined by § 5-38-101. Likewise, not all buildings are "occupiable structures." Accordingly, not every attempt at destruction of a vehicle or structure may be met by deadly physical force.

See AMCI 4106.

Original Commentary to § 5-2-609

The language of § 5-2-609 is calculated to make it clear that the use of deadly physical force is not an appropriate means to thwart "theft" or "criminal mischief" involving conduct not constituting a felony involving force or violence. Both "theft" and "criminal mischief" are terms of art and are defined by Chapter 39 and §§ 5-38-203 and -204, respectively. Under § 5-2-609, theft or criminal mischief may in any event be met by physical force proportioned to the necessities of the situation. Section 5-2-609 extends somewhat the holdings of *Brown* and *Carpenter*, *supra*, and *Darling v. State*, 148 Ark. 653, 225 S.W. 328 (1920) (reported only in Southwest Reporter). The section represents the Commission's agreement with a sentiment expressed by the *Carpenter*

Court: "Life is too valuable to be sacrificed solely for the protection of property." *Id.* at 310, 36 S.W. at 907.

Lest the Code formulation appear too restrictive, it should be borne in mind that any felonious theft of property occurring in circumstances such that the possessor or owner has opportunity to defend will likely take the form of robbery or burglary. Any robbery or burglary may be met by deadly physical force. In addition, since felony criminal mischief is defined in terms of conduct aimed at destruction of or damage to property, the most aggravated forms of criminal mischief may be met by deadly physical force. See, § 5-38-203.

See AMCI 4107.

Original Commentary to § 5-2-610

Subsection 5-2-610(a) confers the justification defense upon a law enforcement officer who uses physical force or threatens to use deadly physical force, if he reasonably believes either course to be necessary in making an arrest, preventing an escape, or in defending himself or another person during an arrest or an attempted escape. The use of deadly physical force is limited to the circumstances set out in subsection (b).

Taken as a whole, § 5-2-610(a) is in substantial agreement with pre-existing Arkansas law. See, e.g., Ark. Stat. Ann. § 43-413 (Repl. 1964) ("Force. No unnecessary force or violence shall be used in making the arrest"); *Edgin v. Talley*, 169 Ark. 662, 276 S.W. 591 (1925); *Gillespie v. State*, 69 Ark. 573, 64 S.W. 947 (1901). With respect to the use of force to arrest or prevent the escape of a misdemeanor, the lead case, *Thomas v. Kinkead*, 55 Ark. 502, 18 S.W. 854 (1892), provides as follows:

"... [W]e therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. In making the arrest or preventing the escape, the

officer may exert such physical force as is necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself." *Id.* at 509, 18 S.W. at 856. See, also, *Deatherage v. State*, 194 Ark. 513, 108 S.W. 2d 904 (1937).

Subsection (b)(1) restates earlier law permitting an officer to employ deadly physical force in effecting the arrest or preventing the escape of one reasonably believed to be a felon. See prior law formerly codified as Ark. Stat. Ann. § 41-2238 (Repl. 1964). Subsection (b)(2) recognizes that an officer can use deadly physical force to defend himself or another in response to lethal resistance by a person he is arresting, regardless of the offense with which the person is charged. As previously mentioned, the only difference between the officer's right to use deadly force in defense of himself or another and the right of a private citizen is that the officer is under no duty to retreat. See, *Commentary* to § 5-2-607.

1988 Supplementary Commentary to § 5-2-610

Use of Deadly Force to Arrest Unarmed, Nondeadly Felons

In *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), the Court faced the issue of whether deadly force can be used to arrest fleeing persons suspected of committing any felony. The Court began by noting that "(a)t least twenty-four states, including five in this circuit (including Arkansas) codify the common law and provide that deadly force may be used to arrest any felony suspect." 547 F.2d at 1012. The court held that Missouri statutes permitting use of such force create "conclusive presumption(s) that all fleeing felons pose a danger to the bodily security of the arresting officers and of the general public" and found them violative of the Fifth and Fourteenth Amendments to the federal constitution. 547 F.2d at 1019.

The *Mattis* decision was thereafter vacated in *Ashcroft v. Mattis*, 431 U.S. 171 (1977) for want of a "case or controversy." Because the Supreme Court did not reach the merits of the case, the constitutionality of Ark. Stat. Ann. § 5-2-610(b)(1) remained open to question.

The Supreme Court has since decided that it is unconstitutional under the Fourth Amendment to the Federal Constitution for police officers to use deadly force to arrest or prevent the escape of unarmed, nondangerous felony suspects. *Tennessee v. Garner*, 471 U.S. 1 (1985).

The Tennessee statute in question provided that "[i]f, after notice of the inten-

tion to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7-108 (1982). Finding that the statute was not unconstitutional on its face, the Court nonetheless opined that

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

471 U.S. at 11.

Like Tennessee's, Arkansas's statute permits a police officer to use deadly force to arrest or prevent the escape of any felon, and to this extent it is unconstitutional.

See AMCI 4108.

Original Commentary to § 5-2-611

It is clear that previous authority permitted a private citizen to make an arrest on his own initiative when he had reasonable grounds for believing that the person sought to be arrested had committed a felony. See Ark. Stat. Ann. § 43-404 (Repl. 1964); *Rayburn v. State*, 200 Ark. 914, 141 S.W.2d 532 (1940); and *Martin v. State*, 97 Ark. 212, 133 S.W. 598 (1911).

See also, Ark. R. Crim. P. 4.1. Subsection 5-2-611(a), added by Act 474 of 1977, codifies this authority and explicitly provides that a reasonable degree of nondeadly physical force may be used.

A fortiori, appropriate force may be used

to make an arrest at the direction of a law enforcement officer, as provided by §§ 5-2-611(b) and (c). In fact, the Supreme Court has recently upheld a statute making it a crime to fail to assist an officer's proper request for aid in making an arrest for a misdemeanor offense. *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117 (1973). See also, Ark. Stat. Ann. § 43-415, §§ 42-202 to -204 (Repl. 1964); § 5-54-109.

Subsection 5-2-611(c) prohibits the private citizen from using deadly physical force in effecting an arrest unless such force is necessary to defend himself or a

third person, including the officer, from the use of lethal force by the person sought to be arrested.

Original Commentary to § 5-2-612

Section 5-2-612 adopts the "no sock" principle discouraging physical resistance of an arresting officer. As pointed out by the *Commentary to Proposed Oregon Code* § 32: "[O]rderly procedure dictates peaceful submission to duly constituted law enforcement authority in the first instance; and . . . if it develops that the officer was mistaken and the arrest unauthorized, ample means and opportunity for remedial action in the courts are available to the person arrested." *Id.* at 31.

Section 5-2-612 should, of course, be read in conjunction with § 5-54-103 establishing the substantive offense of resisting arrest. Former statutory law on the topic of resisting arrest or execution of other legal process was found at Ark. Stat. Ann. §§ 41-2801, 41-2803 (Repl. 1964); and §§ 41-2802, 41-2802.2 (Supp. 1973).

Under prior law it was clear that under no circumstances might one employ physical force to resist a lawful arrest. Whether one could justifiably utilize physical force to resist an unlawful arrest or execution of process was, however, unclear. Of course, if the "unlawfulness" of the arrest lay in the use of excessive physical force upon the person to be arrested, the principles set out by the cases in the Commentary to §§ 5-2-606 and -607 permitted self-defense. Dicta in *Patterson v. State*, 141 Ark. 422, 217 S.W. 480 (1920) indicates that one might at least threaten to use deadly force against a law enforcement officer where it appeared that excessive force was being used or might be used to make an arrest.

Id. at 424, 217 S.W. at 480. Common law permitted reasonable resistance to an unlawful arrest. See, also, *Bad Elk v. United States*, 177 U.S. 529, 20 S. Ct. 729, 44 L. Ed. 874 (1900).

Prior law was to the effect that, at least regarding the execution of a search warrant, "[t]he validity of a criminal process, regular on its face, is immaterial in the prosecution for a violation of this statute [Ark. Stat. Ann. § 41-2803 (Repl. 1964)]. One cannot defy and obstruct the service of such a process without being subject to prosecution." *Crabtree v. State*, 238 Ark. 358, 360, 381 S.W.2d 729, 730 (1964). See, also, *Appling v. State*, 95 Ark. 185, 128 S.W. 866 (1910): "[I]n the absence of an affidavit, a writ of the kind [search warrant], regular on its face, is sufficient to protect the officer to whom it is directed, and an individual can not bid defiance to the writ and obstruct its execution without subjecting himself to criminal prosecution under the statute." *Id.* at 186, 128 S.W. at 867. See, also, 6 Ark. L. Rev. 46 (1951); Annot., 44 A.L.R. 3d 1078 (1972).

Moreover, there was apparently no decisional law as to whether an unlawful *warrantless* arrest might be resisted by physical force. In any event, subject to the provisions of §§ 5-2-606 and 607, the defense of justification will now fail if interposed in a case involving resistance to a lawful or unlawful arrest, whether or not under warrant, so long as the person resisting knew or should have known the arrest was by an officer or a person acting at his direction.

1988 Supplementary Commentary to § 5-2-612

Resistance to Unlawful Arrest by Non-Law Enforcement Officer

This section does not govern cases in which physical force is used to resist an

unlawful arrest made by one who is not a law enforcement officer. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Original Commentary to § 5-2-613

This section provides special protection to persons under a duty to prevent the escape of inmates from correctional facilities. Compare, § 5-2-613 with the more restrictive provisions of § 5-2-605(2). See, *Commentary* to § 5-2-605(2), *supra*. The section comports with previous Arkansas authority in prohibiting the use of deadly physical force to prevent the escape of a person convicted or charged only with a misdemeanor. See the quoted language of *Thomas v. Kinkad*, 55 Ark. 502, 18 S.W.

854 (1892), set out in the *Commentary* to § 5-2-610, *supra*. Imposing strict liability on a guard in an escape situation is obviously unfair, since there may be insufficient time to determine whether an escaping prisoner is a felon or a misdemeanant. Consequently, the defense of justification is withheld only if the guard employs deadly physical force against one who he knows or reasonably should know has committed only a misdemeanor.

Original Commentary to § 5-2-614

Section 5-2-614 applies to situations in which force is recklessly or negligently employed. Under such circumstances the defense of justification cannot be successfully interposed in a prosecution for an offense established by proof of reckless or negligent conduct.

In so providing the Code is aligned with the stance of the Model Penal Code Reporter: "[W]e do not believe a person ought to be convicted for a crime of intention where he has labored under a mistake such that, had the facts been as he supposed, he would have been free from guilt. The unreasonableness of an alleged belief may be evidenced [sic] that it was not in fact held, but if the tribunal is satisfied that the belief was held, the defendant in a prosecution for a crime founded on wrongful purpose should be entitled to be judged on the assumption that his belief was true. To convict for a belief arrived at on unreasonable grounds is, as we have urged, to convict for negligence. Where the crime otherwise requires greater culpability for a conviction, it is neither fair nor logical to convict when there is only negligence as to the circumstances that would establish a justification." *M.P.C. § 3.09, Comment at 78 (Tent. Draft No. 8, 1958)*.

For example, assume a conductor recklessly misconstrues conduct by a passenger on a carrier as a breach of the peace,

applies physical force, and injures the passenger. Section 5-2-614(a) would protect the conductor by permitting him to interpose a defense based on § 5-2-604(3) to a prosecution for purposeful conduct under § 5-13-202 (Battery in the second degree). However, because the conductor acted recklessly in assessing the need to use force, § 5-2-614(a) withdraws justification as a defense to a prosecution under § 5-13-203(a)(2) (Battery in the third degree), since proof of recklessness suffices for conviction of the latter offense.

The section operates the same way when the recklessness or negligence has to do with the amount of force employed as opposed to the necessity of using it in the first instance. The section is in harmony with pre-existing authority. *Dean v. State*, 139 Ark. 433, 214 S.W. 38 (1919); and *Bruder v. State*, 110 Ark. 402, 161 S.W. 1067 (1913).

Subsection 5-2-614(b) revokes the defense to the same extent as in the preceding subsection in circumstances where the conduct charged to constitute the offense is justifiable with regard to its intended object but is reckless or negligent respecting a bystander. For prior case authority see, *Scott v. State*, 75 Ark. 142, 86 S.W. 1004 (1905); and *Ringer v. State*, 74 Ark. 262, 85 S.W. 410 (1905). See, also, Annot., 55 A.L.R.3d 620 (1974).

See AMCI 4110.

1988 Supplementary Commentary to § 5-2-620

Section 1 of Act 880 of 1981 has been codified as § 5-2-620. The Act provides “a legal presumption” that any force “used to defend persons and property against those invading a home is lawful unless the presumption is rebutted by clear and convincing evidence. This section’s effect, when read together with §§ 5-2-606 and 5-2-607, is not entirely clear. Any evidence supporting the presumption necessarily raises defenses under §§ 5-2-606 and 5-2-607 which the State must overcome by evidence disproving them “beyond a reasonable doubt,” a burden of proof greater than “clear and convincing evidence.” Accordingly, at least in the view of the AMCI drafters, this presumption is without effect. See AMCI 4106 (Supp. 1982). In any event, the presumption ensures that justification will frequently be raised as a defense in cases in which an owner uses physical force against a person on the owner’s premises.

In *Carter v. State*, 9 Ark. App. 206, 657 S.W.2d 213 (1983), the Court reached the obvious conclusion that this provision did not provide a defense to battery of police

officers committed immediately after revocation by defendants of consent to search a home. The Court did not go further to explain the effect, if any, of § 5-2-620 upon other provisions in this Chapter.

In *Doles v. State*, 280 Ark. 299, 657 S.W.2d 538 (1983), appellant shot an unarmed acquaintance on appellant’s front porch and argued that since he was in his home the killing was presumed to be justified. The Court rejected this argument using the following language:

The jury was instructed on a recent Arkansas statute although it was not in force at the time of the killing. That statute is Ark. Stat. Ann. § 41-507.1 (Supp. 1983) (§ 5-2-620), which essentially provides that there is a legal presumption that any force used in one’s home is justified unless overcome by clear and convincing evidence. This statute has not legalized murder.

Id. at 300, 657 S.W.2d at 539.

See AMCI 4106, 4107; *Hope v. State*, 294 Ark. 319, 742 S.W.2d 561 (1988).

Original Commentary to § 5-3-101

It is anticipated that § 5-3-101 will be used sparingly because only the most exceptional circumstances will call for its application. The necessity for the provision arises as a consequence of the elimination of the defense of impossibility and the resultant possibility of abusive prosecution for conduct of negligible danger. This provision would allow interposition

of an affirmative defense in rare cases where offenses are sought to be committed by absurdly ineffectual means — for example, attempted homicide by incantations believed to have magical effect. See, *M.P.C. § 5.05(2)*, *Comment at 179* (Tent. Draft No. 1, 1960).

See AMCI 707-D2.

Original Commentary to § 5-3-102

Section 5-3-102 prohibits conviction of more than one inchoate offense designed to achieve the same criminal object. The section does, however, permit a defendant to be charged in the alternative with inchoate crimes designed to culminate in the same offense, the burden of choosing

which offense, if any, has been committed being left to the court or the jury, as the case may be. Compare § 5-3-102 with § 5-1-110(a)(2), providing that a person may not be convicted of an attempt, conspiracy, or solicitation to commit an offense as well as the consummated offense.

Original Commentary to § 5-3-103

Section 5-3-103 advances two defenses in § 5-3-103(a) and provides in § 5-3-103(b) that certain circumstances have no effect on the liability of a defendant prosecuted for either solicitation or conspiracy.

Subsection 5-3-103(a)(1) reaffirms the policy embodied in Chapter 3 at § 5-2-404(a). To provide otherwise, that is "... to hold the victim of a crime guilty of conspiracy to commit it[,] would confound legislative purpose." *M.P.C. § 5.04, Comment at 172 (Tent. Draft No. 10, 1960)*.

Subsection (a)(2) compels a result accordant with previous Arkansas law regarding the liability of a woman procuring an unlawful abortion. See, *Heath v. State*, 249 Ark. 217, 459 S.W. 2d 420 (1970), holding that a female procuring an abortion upon herself is not an accomplice to the offense of abortion.

Subsection (b)(1) takes into account that some offenses may, by definition, be committed only by persons occupying a particular position, or having a particular status or characteristic. For example, only a public servant can commit the offense of misuse of confidential information (§ 5-52-106), and abuse of office (§ 5-52-107). Subsection (b)(1) "accords with the settled rule that a person who is incapable of committing a particular substantive crime because he lacks such position or characteristic may nevertheless be guilty of a conspiracy to commit it. The decisions offer numerous examples of this doctrine: the giver of a bribe has been convicted of conspiring with a public officer to commit the crime of receiving a bribe, which only the public officer could commit; a person

who is not a bankrupt may be convicted of conspiring with a bankrupt to conceal the latter's property from the trustee, although only the bankrupt could be guilty of the substantive crime; and an unmarried man may be convicted of conspiring with a married man that the latter commit adultery. The doctrine is clear upon principle, for agreement to aid another to commit a crime is not rendered less dangerous than any other conspiracy by virtue of the fact that one party cannot commit it so long as the other party can." *M.P.C. § 5.04, Comment at 170 (Tent. Draft No. 10, 1960)*.

Subsection (b)(2) is designed to bar defenses based on the fact that other conspirators are not liable to prosecution for their participation in the conspiracy. It would find application, for example, if one of the conspirators is actually working for the police and only pretends to agree to an illegal course of conduct. Likewise, the actor does not escape punishment merely because the other conspirators have a valid defense based on mental disease or immaturity.

Subsections (b)(3) and (4) further foreclose defenses not relevant to the defendant's culpability or dangerousness. *Cf.*, § 5-2-405(2) and *Commentary thereto, supra*.

Finally, subsection (b)(5) rules out a defense based on the actor's incapacity to commit the offense in an individual capacity. For elucidations of the effect of this provision, see the *Commentary* to § 5-2-405(1), *supra*.

1988 Supplementary Commentary to § 5-3-103

Immunity of Alleged Co-Conspirator

The Arkansas Court of Appeals relied upon the commentary to this section in finding that appellant, convicted of conspiracy to deliver controlled substances and to commit arson, was not entitled to reversal on grounds that there can be no conspiracy where all alleged co-conspirators are undercover police officers. See § 5-3-103(b)(2); *Guinn v. State*, 23 Ark. App. 5, 740 S.W.2d 148 (1987).

Acquittal of Co-Conspirator at Joint Trial as Defense, Notwithstanding § 5-3-103(b)(3)

The Arkansas Supreme Court has made it clear that where all but one alleged co-conspirator are acquitted at a joint trial under circumstances where there are no unnamed alleged co-conspirators, the conspiracy conviction of the remaining defendant is a logical impossibility and cannot be upheld by resort to § 5-3-103(b)(3).

Yedrysek v. State, 293 Ark. 541, 739 S.W.2d 672 (1987). Section 5-3-103(b)(3)

applies only to inconsistent verdicts reached after *separate* trials.

Original Commentary to § 5-3-201

Comment to § 5-3-201

The following are examples of types of conduct that, if strongly corroborative of criminal purpose, might reasonably be held by a trier of fact to be substantial steps:

(1) lying in wait, searching for or following the contemplated victim of the offense;

(2) enticing or seeking to entice the contemplated victim of the offense to go to the place contemplated for its commission;

(3) reconnoitering the place contemplated for the commission of the offense;

(4) unlawful entry of a structure, vehicle or inclosure in which it is contemplated that the offense will be committed;

(5) possession of materials to be employed in the commission of the offense, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(6) possession, collection or fabrication of materials to be employed in the commission of the offense, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(7) soliciting an innocent agent to engage in conduct constituting an element of the offense.

This enumeration, taken from M.P.C. § 5.01(2), is not an exhaustive one but, as indicated above, is intended merely to be illustrative.

Inchoate Offenses Generally:

Chapter 3 is concerned with the definition and grading of attempts, solicitations, and conspiracies — all designated inchoate offenses because each involves conduct that is calculated to result in the commission of a substantive criminal offense but which falls short of culmination.

Although the chapter's method of approaching incipient criminal conduct represents a new approach in Arkansas, this is not to say that former law did not proscribe conduct not achieving the ultimate result the law sought to prevent. It has been asserted that virtually all "sub-

stantive" offenses are inchoate in the sense that successful prosecution does not hang on proof that the evil sought to be prevented by the statute defining the offense has, in fact, been achieved. Forgery and burglary are commonly cited examples of crimes defined in terms of conduct that, though relatively innocuous in itself, is severely penalized because of its ultimate objective. Regarding forgery, the law seeks to prevent theft by deception. In the case of burglary, the chief evils sought to be averted are, in fact, larceny and injury to persons. Indeed, it has been noted that homicide is the only common crime which by its definition calls for proof that the full evil the law endeavors to prevent has come to pass. See, *M.P.C. Introductory Comments at 24 (Tent. Draft No. 10, 1960)*.

Attempts Generally:

The chapter begins with § 5-3-201 defining criminal attempt. Under prior law, one approach to dealing with attempted, but unsuccessful, criminal endeavors was to define attempts to commit serious crimes as assaultive offenses. See, e.g., prior law formerly codified as Ark. Stat. Ann. §§ 41-606 (Repl. 1964) (Assault with intent to kill); 41-607 (Repl. 1964) (Assault with intent to rape); 41-608 (Repl. 1964) (Assault with intent to commit mayhem or larceny); and 41-609 (Repl. 1964) (Assault with intent to rob). Obviously, serious restrictions inhere in such an approach. It cannot be utilized to get at attempted bribery, forgery, frauds, or any other offense not of itself assaultive in nature. Accordingly this approach was rejected by the Commission as being inefficient.

A second way in which prior law dealt with attempts was to define substantive offenses to include attempts to commit that offense. See, e.g., previous authority formerly found at Ark. Stat. Ann. § 41-502 (Repl. 1964). Proceeding by way of patchwork revision through the entire body of Arkansas criminal law adding attempt language to each provision was thought undesirable for a number of reasons. Initially, it would have offered no definition of what constitutes an attempt.

Also, such an approach would have led to unnecessarily prolix and complicated statutes. See, e.g., previous authority formerly found at Ark. Stat. Ann. § 41-1126 (Repl. 1964). It would also have tended to result in attempts being graded for purposes of punishment as seriously as the completed offense — something that the Code does not preclude but does not inevitably entail. That is, nothing in the Code prevents the legislature from selectively imposing attempt liability equivalent in severity to that of the consummated offense.

The Commission felt that what was needed, and what it has sought to provide, was a comprehensive system dealing in a uniform fashion with factors such as legal and factual impossibility; renunciation of criminal purpose; accomplice liability; various sorts of incapacities or immunities respecting the actor or those criminally associated with him; and penal sanctions for inchoate criminal conduct.

Grading Generally:

Grading, i.e., determining appropriate punishment, introduces complex considerations into this area of the law. For example,

"[S]ince [inchoate] offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction — which the actor by hypothesis ignores — that is threatened for the crime that is his object." *M.P.C. Introductory Comment at 24 (Tent. Draft No. 10, 1960)*.

But although the goal of deterrence is not well served by attaching criminal liability to inchoate conduct, other goals of the criminal justice system are:

"First: When a person is seriously dedicated to commission of a crime, there is obviously need for a firm legal basis for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime

may be committed while if they act they may not yet have any valid charge.

"Second: Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.

"Third: Finally, and quite apart from these considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system, designed to serve the proper goals of penal law." *M.P.C. Introductory Comment at 25 (Tent. Draft No. 10, 1960)*.

To the extent that the Commission embraced the goals of the Model Penal Code, the Code partakes of its recommendations, particularly those of abolishing the defense of impossibility, establishing solicitation as an offense, permitting a narrowly circumscribed defense of renunciation, and dispensing comparable punishment for the inchoate offense and the crime that is its object.

Subsections 5-3-201(a) and (b) are framed so as to have application only to purposeful conduct, accompanied in subsections (a)(1) and (a)(2) by a belief in attendant circumstances and in (b) by a knowing culpable mental state regarding a result. The sections have overlapping coverage and are not set out in alternative form solely to pick up distinct kinds of conduct.

Subsection 5-3-201(a)(1) is directed at the completed course of conduct. For example, assume A shoots at a tree, thinking it is B, with a purpose to kill B. If A's conduct would have constituted the offense of murder had A, in fact, killed B, A has committed attempted murder. Subsections 5-3-201(a)(2) and 5-3-201(b) would also cover this hypothetical conduct. They are, however, primarily directed at situations where substantial

steps not amounting to completed courses of conduct have been taken, but have not culminated in the commission of the object offense.

Both §§ 5-3-201(a)(1) and (2) require that the defendant be judged on the basis of what he believes the attendant circumstances to be, not what the attendant circumstances actually are. Thus, he is precluded from arguing that in light of the actual facts his conduct could not possibly result in the commission of the ultimate offense. The language "attendant circumstances" in §§ 5-3-201(a)(1) and (2) refers to factual attendant circumstances and not to the actor's belief regarding what the law prohibits or permits. Consequently there can be no conviction for attempt based on non-criminal conduct engaged in by an actor thinking that he is committing or attempting a crime.

Consider the following hypotheticals:

(1) A, mistakenly believing B to be a juror, offers B a bribe. A commits the offense of attempted bribery under § 5-3-201(a)(2) irrespective of his mistaken notions as to attendant circumstances, viz., the status of B.

(2) A, believing B is a juror, engages in conduct relative to B believing the conduct constitutes juror bribery. Actually, it does not. Regardless of the status of B, no liability accrues here because A's mistaken belief is as to the law.

(3) A, believing B is a juror, attempts to bribe B, believing a statute makes such conduct criminal. In fact, there is no such statute. A has not committed an offense.

Subsection 5-3-201(b) makes it clear that, with respect to result oriented offenses, purposeful conduct constituting a substantial step in a chain of events intended or known to be capable of produc-

ing a result gives rise to liability if accompanied by the culpable mental state, respecting attendant circumstances, required by the definition of the object offense. This section is necessary to cover situations such as the following: A blows up an occupied building, not intending to cause the death of another person, but knowing or believing in the virtual inevitability of this result. If fortuitously no one is killed, A may nonetheless be prosecuted for attempted second degree murder under § 5-10-103(a)(2) despite the absence of any purpose on his part to cause a death. A's conduct would not be reached under subsection 5-3-201(a)(1) or (2) because of this absence of purpose. Accordingly, to reach this sort of conduct, subsection (b) relaxes somewhat the purposeful conduct requirement common to the Code's inchoate offenses: under § 5-3-201(b) knowledge regarding a result will generate liability when coupled with purposeful conduct. See, *M.P.C. § 5.01, Comment at 29 (Tent. Draft No. 10, 1960)*.

Subsection 5-3-201(c) is designed to call attention to, if not to explain by specific guideline, the distinction between "preparation" and attempt. When read in conjunction with the *Comment*, § 5-3-201(c) changes Arkansas law to a slight extent by allowing imposition of criminal liability for conduct further removed from consummation of an offense. See, *Turnage v. State*, 182 Ark. 74, 30 S.W.2d 865 (1930). But it remains clear that under the Code not every act done in conjunction with the intent to commit a crime constitutes an attempt to commit that crime.

The *Comment* to § 5-3-201 is taken from the Model Penal Code and as indicated is illustrative, not exhaustive.

1988 Supplementary Commentary to § 5-3-201

"Same Conduct" Bar to Two Convictions Under § 5-1-110

For circumstances under which a conviction of one offense precludes conviction of attempted commission of a different offense, see *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981), holding in effect that aggravated robbery is a lesser included offense of attempted capital murder where the same conduct (§ 5-1-110(a)) constituted both offenses. *Swaite, supra*,

should be read in conjunction with *Rowe v. State*, 271 Ark. 20, 607 S.W. 2d 657 (1980), cert. denied, 450 U.S. 1043 (1981), where convictions of aggravated robbery and attempted capital murder were upheld. In *Rowe, supra*, the Court held that neither aggravated robbery nor capital murder is defined as a "continuing course of conduct." Section 5-1-110(a)(5). The Court then went on to analyze appellant's conduct and concluded that it involved dis-

tinct impulses arising at different times, justifying conviction of separate offenses. The Court did not address whether both convictions could stand under § 5-1-110(a)(1). But in a subsequent proceeding under Ark. R. Crim. P. 37, the Court vacated the conviction, holding that aggravated robbery was a lesser included offense of attempted capital murder and that convictions of both offenses were impermissible under § 5-1-110(a)(1). *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982). See supplementary commentary to § 5-1-110. See also, AMCI 701 to 702-D2.

Though *Swaite* does not announce a general rule regulating multiple convictions of both substantive and inchoate offenses, the Code does. See §§ 5-3-102; 5-1-110(a)(2); and the original commentary to § 5-3-102.

Substantial Step Under § 5-3-102(a)(2)

Appellant in *Berry v. State*, 278 Ark. 578, 647 S.W.2d 453 (1983) argued that touching his intended victims was a prerequisite to conviction of attempted rape. Since the testimony showed that he made two women disrobe at knifepoint in an isolated area after announcing his intention to have sexual intercourse with them, the Court had little difficulty rejecting the contention.

Multiple Convictions Based on Same Conduct Permitted

In *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985) the Court of Appeals upheld the defendant's convictions of burglary and attempted rape.

The evidence showed that the defendant entered the victim's home uninvited and solicited sex without physically abusing her or attempting to do so. The victim understandably became agitated, ran from her home, and contacted the police, who arrested defendant shortly thereafter. The court found that the unlawful entry followed by the defendant's entreaties constituted "a substantial step in a course of conduct intended to culminate in the commission of an offense." § 5-3-102(a)(2).

The four judge majority opinion did not touch on whether convictions of both at-

tempted rape and burglary could stand under § 5-1-110, since this issue was not raised at trial or briefed on appeal. A concurring opinion argued, however, that had the question been faced both convictions should stand because "it is not necessary to prove an unlawful entry into an occupiable structure to establish rape or attempted rape." *Id.* at 140, 690 S.W.2d at 736.

Two judges dissented from the affirmation of both convictions, stating that, since the court found that defendant's entry into the house and the solicitation of the victim constituted the substantial step on which defendant's conviction of attempted rape was based, the convictions were *in fact* based upon the same conduct. In other words, the concurring opinion interprets § 41-105 to require that the Court compare statutory definitions in determining whether one offense "is established by proof of the same or less than all the elements required to establish the commission of [another offense]." § 5-1-110(b)(1). The dissent, on the other hand, seems to argue that the determination should turn on whether the same conduct is *actually* the basis for each conviction. No Arkansas case has been found in which these alternative readings of § 5-1-110 have been drawn in issue. Since the majority in *Avery* did not reach this issue, the question has not yet been decided. It should be noted, however, that in *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983) in a discussion of whether convictions for battery in the first degree under § 5-13-201(a)(4) and aggravated robbery could stand, the Court said:

The information charged battery in the first degree by use of the pistol which was used to commit the aggravated robbery. Therefore, *the facts* of the present case *required proof* of the aggravated robbery, the underlying felony, in the course of proving battery in the first degree which was alleged to have been committed during the course of a felony. Under the informations here in question the greater offense *was actually included* in the lesser offense.

Id. at 183, 644 S.W.2d 275.

Original Commentary to § 5-3-202

Under prior law accessory liability arose from "aiding, abetting, or assisting" the commission of an offense. See previous authority formerly codified as Ark. Stat. Ann. § 41-119 (Repl. 1964). Conspiracy was also made punishable. See previous authority formerly found at Ark. Stat. Ann. §§ 41-1201 — 1203 (Repl. 1964). But both statutory and case law were silent as to the criminality of conduct designed to aid the commission of an offense not committed.

The Model Penal Code Commentary provides two examples of situations where imposition of liability for such conduct would seem particularly appropriate:

"Two cases, on their facts, involve attempted aiding and abetting. In one a policeman, desiring to assist an illegal gambling establishment, telephoned the proprietors that the police were closing in. The police, however, were already in possession of the premises and one of the officers answered the phone. The court held the actor guilty of malfeasance in office but predicated liability on an attempt to aid and abet the criminal operation, treating such attempt as a ground of general criminal liability. [*Commonwealth v. Haines*, 147 Pa. Super. Ct. 165, 24 A.2d 85 (1942).] In the other, a driver brought a truckload of supplies to within several hundred yards of an illegal still; the still was then in the hands of the police. The court held that the defendant was not guilty of attempting to manufacture illegal liquor or of aiding and abetting in such manufacture, but did not consider the issue of attempted aiding and abetting. [*West v. Commonwealth*, 156 Va. 975, 157 S.E. 538 (1931).]

"Another instance of conduct designed to aid in the commission of a crime is suggested by the case of *State v. Tally*, [102 Ala. 25, 15 So. 722 (1894)] where a

judge was impeached for aiding and abetting the murder of one Ross. The judge, knowing that armed men were pursuing Ross in order to kill him and that a telegram had been sent to Ross warning him of his danger, sent a telegram to the telegraph operator at the other end of the line, who was a friend of his, directing him not to warn Ross. Ross was not warned and was killed by his pursuers. There was no evidence of preconcert between the judge and Ross's pursuers. If the judge had been unsuccessful in his effort to prevent Ross from being warned and Ross had escaped, or if, notwithstanding the effective suppression of the warning, Ross had not been killed, the judge would have engaged in conduct designed to aid the others to murder Ross and liability would be established under this subsection." *M.P.C. § 5.01(3), Comment at 68, 69 (Tentative Draft No. 10, 1960).*

This section is also necessary because, as is evident from the definitions of solicitation and conspiracy, *infra* at §§ 5-3-301, 401, conduct designed to aid commission of a crime does not necessarily constitute conspiracy or solicitation. It will also be noted that § 5-3-202 does not require conduct strongly corroborative of criminal purpose as a prerequisite for criminal accountability. This is so because the test of involvement in criminal activity is that of § 5-2-402, defining accomplice liability. As is true in the case of the general attempt section, the rationale supporting imposition of criminal liability here has to do with the actor's dangerous disposition toward criminality.

Lastly, subsection (b) explicitly withdraws as a defense that the offense was not committed or attempted, and tracks §§ 5-3-301(a)(2) and 5-3-301(b) in abrogating the defense of factual impossibility.

See AMCI 702.

Original Commentary to § 5-3-203

Prior law approached grading of attempts from at least four different avenues.

First, some attempts were prohibited by the statute defining the substantive offense involved, and were consequently graded at the same level. See, e.g., prior

law formerly found at Ark. Stat. Ann. §§ 41-1126 (Repl. 1964) (Indecent proposals to minors); and 41-502 (Repl. 1964) (Convict burning penitentiary). In other cases, the offense of attempt was defined by a separate act. See, e.g., prior law formerly found at Ark. Stat. Ann. §§ 41-

3010 (Repl. 1964) (Perjury — attempt — penalty); and 41-3510 (Supp. 1973) (Attempt at escape — penalty). As previously mentioned, still other attempts were treated as substantive assault offenses. These commonly entailed penalties comparable to those of the substantive offense defined as the object of the assault. Compare, e.g., prior law formerly found at Ark. Stat. Ann. § 41-607 (Repl. 1964) (Assault with intent to rape) with § 41-3403 (Supp. 1973) (Penalties for rape). Finally, where no attempt liability was imposed either by the statute defining the object offense or by a related statute, an attempt was criminally punishable only pursuant to prior law formerly codified as Ark. Stat. Ann. § 41-107 (Repl. 1964), allowing imposition of misdemeanor liability for an attempt to commit a felony.

Considerations exist other than those mentioned in the preceding general com-

ments on grading. Attempted criminal conduct, while broadly indicative of a person's character, does not always provide an accurate indication of his dangerousness. This is especially true under the Code because attempt liability accrues at a point in time somewhat more removed from the consummated offense than at common law. Accordingly, police intervention may occur in cases where the defendant would have eventually abandoned his criminal conduct short of committing the ultimate offense. This is equally the case as regards conspiracies and solicitations. As a result, the Commission has declined to follow the Model Penal Code grading scheme imposing identical liability for attempts, solicitations, and conspiracies and the object offense. Also rejected is the concept of grading according to the proximity of conduct to culmination in the object offense.

1988 Supplementary Commentary to § 5-3-203

Amendments

Act 620 of 1981 created class Y felonies and reclassified most class A felonies as such. Act 620 simply amends this section

to reflect that attempted commission of a class Y felony is a class A felony. No attempts receive class Y felony grading.

See AMCI 6100 *et seq.*

Original Commentary to § 5-3-204

Section 5-3-204 is composed of two subsections, each of which provides as an affirmative defense renunciation of criminal purpose. In providing these affirmative defenses the Code follows the prevailing view among jurisdictions.

The language of § 5-3-204(a) is virtually identical with the first paragraph of M.P.C. § 5.01(4) and imposes stringent proof requirements upon a defendant seeking to interpose the affirmative defense to a prosecution under §§ 5-3-201(a)(2) or 5-3-201(b). Because this is an affirmative defense, the defendant bears the burden of proving the defense by a preponderance of the evidence. Moreover, the defense is phrased so as to impose cumulative proof requirements. The defendant must show he abandoned his efforts to commit the object offense and thereby prevented its commission. Finally, he must demonstrate that his abandonment was both voluntary and complete, as opposed, for example, to being motivated by the realization that appre-

hension was imminent. This affirmative defense is not available to the defendant prosecuted under § 5-3-201(a)(1): that subsection pertains to situations where the defendant has completed the conduct intended to result in the crime.

Subsection 5-3-204(b) provides an affirmative defense to a prosecution under § 5-3-202 and imposes disjunctive proof requirements upon the party asserting it. A definition of "voluntary" conduct is not essayed, it being the sense of the Commission that, because of the complexity of the concept, such a definition was best left to the courts for determination on a case by case basis.

Subsection 5-3-204(a) follows most new codes in requiring that the actor prevent the commission of the object offense. By contrast § 5-3-204(b) imposes no such obligation since it applies only when the actor has endeavored to facilitate or promote the commission of a crime never committed. Moreover, prosecutions under § 5-3-201 will in most cases involve indi-

vidual, as opposed to concerted, conduct. Consequently, the actor is more likely to be in command of the situation, allowing him to halt at will progress toward committing the object offense. This is not the case, however, respecting the defendant prosecuted under § 5-3-202 — nor in conspiracy or solicitation contexts — because, by definition, the defendant is not the only person bent on perpetrating the offense. Accordingly, he may not be in a position to impede accomplishment of the criminal goal. Additionally, if his role in the crime was small, the defendant would not be able to show that a true abandonment “thereby prevented” the occurrence of the offense. For this reason, the language of § 5-3-204(b) parallels that of § 5-2-404(b), although the latter subsection provides an affirmative defense where the substantive offense has actually taken place.

The affirmative defenses provided by both subsections are grounded on two related considerations:

“First, renunciation of criminal purpose tends to negative dangerousness. As previously indicated, much of the effort devoted to excluding early ‘preparatory’ conduct from criminal attempt liability is based on the desire not to punish where there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for preparation, indicating *prima facie* sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely

renouncing his purpose to commit the crime.

“This line of reasoning, however, may prove unsatisfactory where the actor has proceeded far toward the commission of the contemplated crime, or has perhaps committed the ‘last proximate act.’ It may be argued that, whatever the inference to be drawn where the actor’s conduct was in the area near the preparation-attempt line, in cases of further progress the inference of dangerousness from such an advanced criminal effort outweighs the countervailing inference arising from abandonment of the effort. However, it is in this latter class of cases that the second of the two policy considerations comes most strongly into play.

“A second reason for allowing renunciation of the criminal purpose as a defense to an attempt charge is to encourage actors to desist from pressing forward with their criminal designs, thereby diminishing the risk that the substantive crime will be committed. While, under the proposed subsection, such encouragement is held out at all stages of the criminal effort, its significance becomes greatest as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high. At the very point where abandonment least influences a judgment as to the dangerousness of the actor — where the last proximate act has been committed but the resulting crime can still be avoided — the inducement to desist stemming from the abandonment defense achieves its great value.” *M.P.C. § 5.01(4), Comment at 71, 72 (Tent. Draft No. 10, 1960).*

See AMCI 702-D1.

Original Commentary to § 5-3-301

The legal community does not speak with one voice on the subject of imposing criminal sanctions with respect to one who seeks to induce another to commit an offense. Arguments have been advanced that conduct constituting solicitation to commit an offense does not call for criminal liability, inasmuch as separating the solicitation and the commission of the offense is an independent moral agent — viz., the person solicited. See, e.g., *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925); *M.P.C. § 5.02, Comment at 82 (Tent. Draft No. 10, 1960).*

However, the Commission was im-

pressed with the argument that the solicitative effort is deserving of criminal liability. That liability is appropriate here is made all the more apparent by considering the following hypotheticals involving behavior unquestionably giving rise to criminal liability. If A employs B to kill C, and the venture is successful, accomplice liability for C’s death is imposed on A. If the solicitation is effective but B’s attempt on C’s life fails, A is nonetheless criminally liable as an accomplice to attempted murder. If A’s offer leads to an agreement between A and B to murder C, and either party does an overt act in furtherance of

the plan, both A and B are subject to prosecution as conspirators.

Section 5-3-301 is aimed squarely at situations where A's conduct is met with nothing more than a rebuff. It is felt that such a transaction amply demonstrates an attitude of A no less dangerous or real than in the above hypotheticals, irrespective of the fact that the object offense is not committed or even attempted.

Read in connection with the introductory text, § 5-3-301(a)(1) is self explanatory.

The necessity for the "attempt" language of § 5-3-301(a)(2) is aptly put by the Model Penal Code:

"It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would never seek an unsuccessful effort but always the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But in some cases the actor may solicit conduct which he and the party solicited believe to be the completed crime, but which, for the kind of reasons discussed in connection with legal impossibility, does not in fact constitute the crime. Such conduct will constitute an attempt, and under the present section

the actor will be liable for soliciting conduct which constitutes an attempt." *M.P.C. § 5.02(1), Comment at 87 (Tent. Draft No. 10, 1960).*

Subsection 5-3-301(a)(3) creates liability in the following type of situation: A, with the purpose of causing C's death, prepares poisoned food and enlists B, an unwitting, innocent third party, to deliver it to C. Insofar as B is concerned, the conduct solicited would not constitute an offense because B lacks the requisite culpable mental state necessary for liability on his part. A nevertheless is guilty of solicitation. Parenthetically, it might be noted that under the circumstances presented, A is also guilty of attempt under §§ 5-3-201(a)(2) or 5-3-201(b).

Subsection 5-3-301(a)(4) imposes criminal liability where A solicits B to commit any act that would render B an accomplice to the specific object offense committed or attempted. Examples include A soliciting B(1) to drive a getaway car in a robbery; (2) to join in a conspiracy to commit a crime; or (3) to solicit C to commit the object offense.

Subsection 5-3-301(b), grading solicitation offenses, is grounded on the rationale supporting the grading of attempts.

1988 Supplementary Commentary to § 5-3-301

Amendments

Act 620 of 1981 creating class Y felonies merely alters this classification system by imposing class A felony liability for solicitation of a class Y felony. No solicitations received class Y felony grading.

In *Chronister v. State*, 265 Ark. 437, 580 S.W.2d 676 (1979), the Court declined to rule on the contention of an appellant sentenced to 30 years' imprisonment for solicitation to commit murder that expo-

sure to life imprisonment for mere spoken words constituted unconstitutionally excessive punishment. The Court decided the issue on grounds of ripeness. Since appellant received only a 30 year sentence he could not assert arguments based upon the possibility that he could have received a life sentence. The Court gave no indication of how it would have ruled had appellant in fact received a life sentence.

See AMCI 705-705D2.

Original Commentary to § 5-3-302

Subsection 5-3-302 provides for the affirmative defense of renunciation to a solicitation prosecution. Solicitation, of course, is an offense that ex hypothesi involves an actor seeking to achieve a result through another's acts. Consequently, respecting his ability to thwart performance of the offense solicited, the actor is in somewhat the same position as

the person who has attempted to aid in the commission of an offense. See *Commentary* to § 5-3-204, *supra*. But because the solicitor has incited another to perpetrate a crime, it is felt to be appropriate to require him to establish this affirmative defense by proof that he prevented the commission of the offense solicited.

Further defenses are conferred upon

the solicitor or placed beyond his reach by § 5-3-103.

See AMCI 705-D1.

Original Commentary to § 5-3-401

As an offense, conspiracy serves at least two distinct purposes. Initially, as is the case regarding attempts and solicitations, it permits law enforcement authorities to reach preparatory conduct prior to its maturation into the substantive offense that is its object. Secondly, it allows authorities to deal with the special dangers incident to concerted activity directed at unlawful ends. See, *M.P.C. § 5.03, Comment at 96 (Tent. Draft No. 10, 1960)*.

Before enactment of the Code, prosecution of conspiracies was not one of the more effective prosecutorial tools in Arkansas. One suspects that this was so primarily because conspiracy was a misdemeanor offense regardless of the gravity of the offense that was its object. See previous law formerly found at Ark. Stat. Ann. §§ 41-1202 — 1203 (Repl. 1964).

At least two aspects of the definition provision deserve special attention. First, to fall within the prohibition of the section an agreement must contemplate the commission of a criminal offense. This departs from common law, some present federal authority on the subject, and the law of several other jurisdictions, all of which proscribe "conspiracies" to commit lawful but "injurious" acts as well as unlawful acts. See, e.g., *M.P.C. § 5.03, Comment at 102, 103 (Tent. Draft No. 10, 1960)*. A common provision prohibits ". . . any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws." *M.P.C. § 5.03, Comment at 102 (Tent. Draft No. 10, 1960)*. Such broad formulations are generally defended on grounds of increased danger of group over individual activity. The Commission, however, assumes the position that offenses of such uncertain contours have no place in a modern penal code.

Second, the definition of the crime speaks to *individual* culpability by defining the offense in terms of conduct that will give rise to liability of the individual actor. This is a departure from provisions such as former Ark. Stat. Ann. § 41-1201 which spoke in terms of *group* conduct.

One immediately apparent effect of the proposed language is to foreclose the defense that co-conspirators cannot be prosecuted or have been acquitted.

It should also be observed that to fall within the scope of § 5-3-401 one must have "the purpose of promoting or facilitating the commission of any criminal offense." This phrasing serves to exclude from the provision's application persons who engage in conduct that furthers the ends of a conspiracy, but who have no purpose to do so. This is so even if the person knows his conduct assists in the accomplishment of criminal objectives. The Model Penal Code offers the following discussion of the interests that must be accommodated in this area:

"Typical is the case of the person who sells sugar to the producers of illicit whiskey. He may have little interest in the success of the distilling operation and be motivated mainly by the desire to make a normal profit from an otherwise lawful sale. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end. In the case of vendors conflicting interests are also involved: that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes. The decisions are in conflict, although many of those requiring purpose properly emphasize that it can be inferred from such circumstances as, for example, quantity sales, the seller's initiative or encouragement, continuity of the relationship, and the contraband nature of the materials sold. The considerations are the same whether the charge be conspiracy or complicity in the substantive crime, and the Institute has resolved them, in the complicity provisions of the Code, in favor of requiring a purpose to advance the criminal end." *M.P.C. § 50.03, Comment at 107 (Tent. Draft No. 10, 1960)*. See, e.g., *United States v.*

Falcone, 109 F.2d 579 (2d Cir.), *aff'd.*, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940). The prerequisite of conduct also plays an important role in determining whether liability is to be imposed by an individual's association with a group that engages in activities having both lawful and illegal objectives. See, *M.P.C.* § 5.03, *Comment at 108* (*Tent. Draft No. 10, 1960*).

The text of § 5-3-401 is in substantial agreement with earlier Arkansas authority, the Model Penal Code, and a majority of new proposed codes in conditioning liability upon the performance of an overt act done in pursuance of the conspiracy. The Model Penal Code has no such requirement where the object of the conspiracy is

a serious felony. Here, § 5-3-401 departs from the Model Penal Code; an overt act is required in all cases. In demanding proof of an overt act as an element of the offense, the Code solves difficulties as to venue and brings the provision into conformity with the traditional view that, absent action, idle talk does not suffice to establish liability.

It should be noted that neither this section nor any other section of this chapter imposes liability on a conspirator for the substantive offenses that are the object of the conspiracy. Whether the conspirator can be prosecuted for such offenses turns on the rules of accomplice liability, as set out in Chapter 3. See, *Commentary to* § 5-2-403, *supra*.

1988 Supplementary Commentary to § 5-3-401

Corroboration of Accomplice Testimony Required for Conspiracy Conviction

In *Cate v. State*, 270 Ark. 972, 606 S.W.2d 764 (1980), appellant was charged with criminal mischief and conspiracy to commit the offense. He was convicted of the conspiracy charge. On appeal from a decision of the Court of Appeals not designated for publication, the Supreme Court discussed whether a witness called at the trial was an accomplice, pointing out that if she were, appellant should have been acquitted on the conspiracy charge for lack of corroboration required by Ark. Stat. Ann. § 43-2116 [Ark. Code Ann. § 16-89-111(e)(1) (1987)], which the Court interpreted to require corroboration to sustain a conviction of a felony grade conspiracy offense. See, also *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983).

The *Cate* decision does not distinguish between accomplice and co-conspirator testimony. It appears that a defendant cannot be convicted of conspiracy solely on evidence that a conspiracy existed and the testimony of a co-conspirator linking the defendant to conspiracy.

In any event, before enactment of the Criminal Code in 1976, questions about accomplice liability in conspiracy prosecutions did not arise because all conspiracies were misdemeanors. See prior law formerly found at Ark. Stat. Ann. §§ 41-12-1 to 1203 (Repl. 1964). Section 43-2116 [Ark. Code Ann. § 16-89-111] permits con-

viction of a misdemeanor upon the uncorroborated testimony of an accomplice.

Statements of Co-Conspirators: Admissibility

The rule in Arkansas has for some time been that the State must make a prima facie showing of the existence of a conspiracy before the statement of a co-conspirator made out of the presence of the defendant is *admissible* against the defendant. *Easter v. State*, 96 Ark. 629, 132 S.W. 924 (1910). *Patterson v. State*, 267 Ark. 436, 591 S.W.2d 356 (1979) and AMCI 201 require a finding by the jury beyond a reasonable doubt that a conspiracy existed before a defendant can be *convicted* based on statements of co-conspirators admitted into evidence before a conspiracy has been established. *Patterson* and AMCI 201 thus make it clear that a statement purportedly made by a co-conspirator may be adduced by the State before a conspiracy has been established by independent evidence. If independent evidence establishing the conspiracy beyond a reasonable doubt is not subsequently introduced, the statement is inadmissible as evidence against a defendant not present when it was made, though the statement may be admissible on other grounds.

Arkansas Rule of Evidence 801(d)(2)(v) (statement by co-conspirator during course and furtherance of conspiracy not hearsay) has been cited as authority for admission into evidence of statements by

co-conspirators in trials for *substantive offenses*. *Roleson v. State*, 277 Ark. 148, 640 S.W.2d 113 (1982). The Court has permitted this in reliance upon federal cases approving admissibility of co-conspirator statements where a conspiracy was proved at trial, though not alleged in the indictment. *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983); *Smithey v. State*, 269 Ark. 538, 602 S.W.2d 676 (1980).

Because Rule 801 speaks in terms of statements "during the course and in furtherance of the conspiracy," statements made by one co-conspirator to another have been held inadmissible against a third co-conspirator if the crime which was the subject of the conspiracy has been completed. *Smith v. State*, 6 Ark. App. 228, 640 S.W.2d 805 (1982).

Legal Immunities Irrelevant To Exposure To Conviction as Conspirator

Ellis v. State, 4 Ark. App. 201, 628 S.W.2d 871 (1982) makes it clear that a person can be convicted of conspiracy to commit an offense even if he could not commit the substantive offense acting on his own. In *Ellis*, appellant was convicted of conspiracy to commit arson though he was the owner of the property in question and, at the time the offense was committed, the statute defining arson imposed no liability on one who burned his own property. Appellant's co-conspirator had no ownership interest in the property. The Court upheld the conviction, relying on the language of § 5-3-401(1)(A) imposing liability for agreeing with another person that "one or more" of them would commit an offense.

Inchoate Offense Not Lesser Included Offense

Savannah v. State, 7 Ark. App. 161, 645 S.W.2d 694 (1983) puts to rest any question whether an inchoate crime is a lesser included offense of the substantive offense that is its object, holding that conspiracy to commit aggravated robbery is not a lesser included offense of aggravated robbery.

See AMCI 707-08.

Accomplice vs. Conspiracy Liability: Renunciation

The Arkansas Court of Appeals has ruled that one may be an accomplice to conspiracy. *Strickland v. State*, 16 Ark.

App. 293, 701 S.W.2d 127 (1985). Strickland agreed with Howell and Boyce to manufacture methamphetamine, a controlled substance. All contributed money to the scheme. Flaherty, a latecomer, also paid to join the operation. Shortly thereafter he retrieved his money from Strickland at gunpoint. At trial on the charge of conspiracy to manufacture a controlled substance, Flaherty was held not to be an accomplice, and Strickland was convicted on the testimony of Flaherty and others. On appeal, Strickland contended that Flaherty was an accomplice. The Court of Appeals agreed, finding that Flaherty was a co-conspirator and an accomplice.

As for the conspiracy charge, the court held that Flaherty joined the conspiracy by contributing money and agreeing to participate, the payment being the requisite overt act. Ark. Code Ann. § 5-3-401 (1987). Retrieving the money was found insufficient to establish renunciation under Ark. Code Ann. § 5-3-405 (1987).

The court then stated that Flaherty did not withdraw *as an accomplice* when he retrieved his money, holding that "Flaherty became an accomplice to the crime of conspiracy when he agreed to join the conspiracy and provided funds for the accomplishment of its purpose." *Id.* at 297, 701 S.W.2d at 129. Having become an accomplice, Flaherty could establish an affirmative defense only by "terminating his complicity prior to the commission of the offense..." (§ 5-2-404(b)), the court said. The court interpreted the language "the offense" to mean the conspiracy, not the substantive drug offense that was the object of the conspiracy. Since the conspiracy was ongoing, Flaherty could not possibly terminate his complicity prior to its commission and therefore could not establish the renunciation defense to the accomplice charge. Under this reading of the statute, one who joins a conspiracy will *never* be able to renounce and avoid accomplice liability. The Legislature did not intend this result, the purpose of a renunciation provision being to provide an incentive for changing heart.

The Court's decision on accomplice liability turns on Ark. Stat. Ann. § 41-303(1) [Ark. Code Ann. § 5-2-403(a)], defining accomplice liability:

- (a) A person is an accomplice of another person in the commission of an of-

fense if, with the purpose of promoting or facilitating the commission of an offense, he:

- (1) Solicits, advises, encourages, or coerces the other person to *commit it*; or
- (2) Aids, agrees to aid, or attempts to aid the other person in *planning or committing it*...

The statute imposes accomplice liability upon one person for the criminal conduct of another. It speaks in terms of completed offenses. Normally, one is not an accomplice to an offense if, despite his encouragement, no offense is committed. The "offense" aimed at is the substantive defense the parties agree to commit. For example, if A agrees to aid B to manufacture and sell drugs, A has no criminal liability on an accomplice theory unless B actually commits the offense planned. "An offense" is broad enough to cover lesser included and greater inclusive offenses as "offenses that follow directly and immediately in the execution of the common purpose as one of its probable and natural consequences." *Clark v. State*, 169 Ark. 717, 727, 276 S.W. 849, 853 (1925). See, also, *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970); *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985). § 5-2-405(2) (convictions of different offenses and degrees of offenses); § 5-2-406. Subsection 5-2-403(b) governs accomplice liability for crimes such as homicide defined in terms of prohibited results.

In *Strickland* the Court of Appeals held that the "offense" Flaherty was intent on promoting was the conspiracy, not the drug offense that was its object. In other words, the Court held that by agreeing to aid his confederates in a drug manufac-

turing scheme Flaherty satisfied the statute's "promoting or facilitating the commission of an offense" requirement (§ 5-2-403(a)), the "offense" being the conspiracy. Clearly, though, Flaherty's intent for § 5-2-403 purposes was to manufacture and sell drugs, not to "facilitate the commission of" a conspiracy. Flaherty did not agree to aid anyone to commit "the offense" of conspiracy; he agreed to help manufacture and sell methamphetamine.

It is suggested that a better reading of § 5-2-403 in *Strickland* would have required proof that the drug offense or a related offense took place as a prerequisite for accomplice liability. It seems anomalous to hold that the same acts and mental states made Flaherty a member of a conspiracy and an accomplice to the same conspiracy under circumstances such that renunciation was a legal impossibility. This is not to say that there can never be accomplice liability based on an inchoate offense. If A and B agree to murder C, and B attempts unsuccessfully to murder C, then A is an accomplice to attempted murder. But if after the agreement and an overt act no conduct constituting a separate offense occurs, A and B are co-conspirators, not accomplices. It distorts the purpose of the accomplice statute to hold that A is an *accomplice* of B with respect to the conspiracy under such circumstances. Since Flaherty terminated his complicity prior to the commission of the offense of manufacturing drugs, the court could have held that he had established the affirmative offense provided by § 5-2-404(b)(1). See, *Model Penal Code and Commentaries*, Law Institute § 2.06 at 295-313, 326 (1985); Ark. Code Ann. § 5-3-405 (1987).

Original Commentary to § 5-3-402

In circumstances when an actor has clearly conspired to commit an offense, questions may remain as to whether he is a coconspirator with parties unknown to him who compose an expansive network devoted to criminal objectives. The significance of this problem is brought home in the following Model Penal Code Commentary:

"A narcotics operation may involve smugglers, distributors and many retail sellers and result in numerous instances of the commission of different types of

crimes, e.g., importing, possessing and selling the narcotics. A vice ring may involve an overlord, lesser officers, and numerous runners and prostitutes; it may comprehend countless instances of the commission of such crimes as prostitution, and receiving money from her earnings. Has a retailer conspired with the smugglers to import the narcotics? Has a prostitute conspired with the leaders of the vice ring to commit the acts of prostitution of each girl who is controlled by the ring?

"The inquiry may be crucial for a num-

ber of purposes. These include not only defining each defendant's liability but also the propriety of joint prosecution, admissibility against a defendant of the hearsay acts and declarations of others, questions of multiple prosecution or conviction and double jeopardy, satisfaction of the overt act requirement or statutes of limitation or rules of jurisdiction and venue, and possibly also liability for substantive crimes executed pursuant to the conspiracy. The scope problem is thus central to the present concern of courts and commentators about the use of conspiracy — the conflict between the need for effective means of prosecuting large criminal organizations and the dangers of prejudice to individual defendants." *M.P.C. § 5.03 (2), Comment at 118 (Tent. Draft No. 10, 1960)*.

Section 5-3-402 again focuses on the culpability of the individual actor. His liability is limited, with respect to the objectives of a conspiracy, to the crimes he has the purpose of promoting or facilitating, and, with respect to parties, to those with whom he has actually agreed and parties known or unknown to him whom he could reasonably expect to be brought into the concerted activity.

For example, assume A conspires separately with B and C to commit offense X. If B has actual knowledge that A has conspired with C, or if B could reasonably expect such to be the case, then under § 5-3-402, B is deemed to have conspired with C.

Similarly, if A conspires with B under circumstances such that he could reasonably anticipate that B would conspire with C, and thereafter C with D, then A is deemed to have conspired with D. It is important to bear in mind, however, that the proposed formulation speaks in terms of individual culpable mental states and, hence, liability. Accordingly, the fact that

A is deemed to have conspired with D does not have the effect of, ipso facto, rendering D or C coconspirators of A, for under some circumstances D could not reasonably be expected to know that C would conspire with B, who in return would conspire with A. For example, if A, B, and C respectively represent smugglers, distributors, and retailers of drugs, "... it would be possible to find ... that the smugglers conspired to commit the illegal sales of the retailers, but that the retailers did not conspire to commit the importing of the smugglers. Factual situations warranting such a finding may easily be conceived; the smugglers might depend upon and seek to foster their retail markets while the retailers might have many suppliers and be indifferent to the success of any single source." *M.P.C. § 5.03(2), Comment at 121, 122 (Tent. Draft No. 10, 1960)*. So, although A and D may be members of "a conspiracy" if considered from the vantage point of A's liability, they are not from D's. This mode of analysis may have been approved in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). The Commission thus joins the Model Penal Code in submitting that this form of analysis.

"... is justified by the need for effective means of limiting a conspirator's criminal liability and preventing the other abuses possible under looser approaches toward the scope of a conspiracy. Further, we submit that the focus upon each individual's culpability with regard to each criminal objective should be more helpful to juries than the broad formulations with which they are often charged today; and that it accords more closely with traditional standards for testing criminal liability." *M.P.C. § 5.03(2), Comment at 126 (Tent. Draft No. 10, 1960)*.

See AMCI 708.

Original Commentary to § 5-3-403

Section 5-3-403 describes the effect of a multiplicity of criminal objectives upon the scope of a conspiracy. Section 5-3-403 restates prevailing authority and is virtually a verbatim rendition of *M.P.C. § 5.03(3)*.

Under § 5-3-403 a single agreement or "continuous conspiratorial relationship"

constitutes a single conspiracy offense whether intended to culminate in distinct offenses or in successive violations of the same statute. It has the effect of avoiding accumulation of penalties as a result of a single agreement or relationship. It also precludes more than one conspiracy prosecution as a result of a single agreement

or relationship. However, if multiple substantive offenses are committed pursuant to a single conspiracy, a conspirator may be prosecuted for each separate substantive offense in which he is a principal or an accomplice. For example, the dealer who sells drugs on five separate occasions pursuant to an ongoing conspiracy to distribute drugs can be prosecuted on five counts of sale but only one count of conspiracy.

The section flows as a logical consequence of formulating the definition of conspiracy in terms of "agreement." It also serves to acknowledge that treating a single agreement to achieve multiple objectives as a number of crimes would in some cases be unduly hard, particularly where, because of a combination of foolhardiness and ineptitude, the nature and scope of the agreement do not provide accurate indicia of the actual dangerousness of the

conspirators. See, *M.P.C. § 5.03(3), Comment at 128 (Tent. Draft No. 10, 1960)*. But,

"[b]y holding that a single conspiracy may embrace a multiplicity of criminal objectives the rule affects the determination of the conspiracy's scope for all purposes. Consequently, it operates to the defendant's disadvantage insofar as these purposes involve a conspirator's accountability for all the activities of all the persons embraced in the conspiracy — e.g., with respect to his liability under present law for substantive crimes, the admissibility against him of hearsay acts and declarations, and satisfaction of the overt act requirement or statutes of limitation or rules of venue and jurisdiction..." *M.P.C. § 5.03(3), Comment at 128, 129 (Tent. Draft No. 10, 1960)*.

Original Commentary to § 5-3-404

Grading of conspiracies is accomplished pursuant to the same scheme employed in grading attempts and solicitations and is

grounded on the reasons advanced in the *Commentary* to § 5-3-203.

1988 Supplementary Commentary to § 5-3-404

Amendments

Act 620 of 1981, creating class Y felonies, merely alters the conspiracy classification system by imposing class A felony

liability for conspiracy to commit a class Y felony. No conspiracies receive class Y felony grading.

See AMCI 6100 *et seq.*

Original Commentary to § 5-3-405

Section 5-3-405 sets out an affirmative defense to conspiracy prosecutions. Renunciation here should not be confused with "abandonment" for purposes of the running of the statute of limitations or "withdrawal" precluding liability for substantive offenses subsequently committed by coconspirators. Abandonment, as a statute of limitations determinant, is treated by § 5-3-406. A defendant's liability for acts of parties with whom he has at one time conspired is governed by §§ 5-2-403, 404.

Traditionally, renunciation has not been a defense to conspiracy prosecutions, because the crime has been defined in terms of the agreement:

"This present rule is rarely questioned, for it follows too easily as a definitional consequence, the conspiracy being defined

as complete with the agreement. The rule may be defended only if the act of agreement itself is considered sufficiently undesirable and indicative of the actor's dangerousness to warrant penal sanctions in spite of subsequent renunciation and action to defeat the purposes of the conspiracy. We do not believe such an assertion is supportable. Further, the present rule is inconsistent with the doctrine allowing an analogous defense in the complicity area, and with the judgment embodied in the provisions of the attempt and solicitation drafts allowing a limited defense of renunciation to those crimes. As we remarked in the *Comments* to Section 5.01(4), this judgment is based on two considerations: that renunciation manifests a lack of the firmness of purpose that evidences individual dangerousness, and that the law

should provide a means for encouraging persons to desist from pressing forward with their criminal designs.” *M.P.C. § 5.03(6), Comment at 143, 144 (Tent. Draft No. 10, 1960).*

The affirmative defense provided by this section is, of course, available only if the offense that is the object of the conspiracy is not committed. Once the criminal objective is achieved, the conspiracy ends and it is too late to renounce. The same principle applies in the event of a conspiracy to commit multiple offenses. The conspirator must renounce before a particular object offense is consummated to avoid prosecution for conspiracy to commit that offense. For example, if a person conspires with others to steal dynamite and blow up a public building and renounces after the dynamite is stolen but before the building is blown up, then he has a defense to charge of conspiracy to commit arson but not to conspiracy to commit theft.

M.P.C. § 5.03(6) requires an actor to thwart the success of a conspiracy in order to avoid liability therefor, and in this respect it is followed by the proposed

codes of Kentucky and Oregon. As a consequence, under these codes, timely notification of law enforcement authorities followed by their inexcusable inaction will not suffice to establish the affirmative defense, although under both the Model Penal Code and § 5-3-406, such notice would commence the running of the statute of limitations. The suggested formulation relaxes somewhat the inflexible Model Penal Code requirement that the commission of the object offense be prevented. Considerations as to ability to prevent the commission of the object offense were weighed by the Commission in connection with defenses to a charge under § 5-3-202. These same considerations seem particularly germane here. It is unrealistic to expect a single individual involved in a massive conspiracy to bring the enterprise to a halt. But because unlawful goals might be at least partially frustrated by a timely warning to an appropriate law enforcement authority, the conspirator should be provided with incentive to give such a warning.

See AMCI 707-D1.

Original Commentary to § 5-3-406

Section 5-3-406 deals with duration of conspiracies for purposes of determining the commencement of the running of the statute of limitations. The statute begins to run when a conspiracy terminates. The section provides that a conspiracy is a continuing course of conduct terminating

either when the object offense is committed or, as respects a particular conspirator's liability, when he advises his coconspirators of his abandonment of the agreement or gives the described notification to law enforcement authorities.

Original Commentary to § 5-3-407

Section 5-3-407 is in substantial conformity with the Model Penal Code in providing that a defendant may be prosecuted wherever an overt act has been committed by any party with whom he has conspired. To the extent that § 5-3-407 speaks in terms of conduct, it increases the likeli-

hood that a prosecution will be brought at or near the situs of the intended object defense. This requirement should not prove overly restrictive in view of the relatively inconsequential nature of conduct constituting an “overt act” under prevailing authority.

Original Commentary to § 5-4-101

Subsections (1) and (2) define the two closely related procedures of “suspension” and “probation.” The distinction between suspension and probation has not always been articulated or preserved by preexisting statutes and case law. As used in the

Code, the only difference between the two is that a suspension leads to release without supervision whereas probation results in supervised release. It should also be noted that probation, as defined, presupposes that the court did not pronounce a

sentence. "Suspension" does not contemplate suspension of *execution* of sentence. For the reasons set out in the Commentary to § 5-4-104, pronouncement of sentence followed by suspension of execution is not a sentencing alternative under the Code.

"Probation officer" is defined quite broadly in subsection (3). Although ideally all courts should have available the services of the type of officer described in Act 818 of 1973 [§§ 16-93-401 to 403; 16-93-103; 16-90-102], the Commission recognizes the lack of sufficient funds to finance such programs in every county. To encourage the use of probation as a sentencing alternative, even in jurisdictions without a full-time, salaried probation officer, the Code authorizes the use of law enforce-

ment officers, social workers, ministers, relatives of the defendant, or any other person the court deems capable of satisfactorily supervising defendant's probation.

Subsection (4) supersedes the language in *Cheaney v. State*, 36 Ark. at 80 (1880) stating that "imprisonment" means incarceration in the county jail or local prison, not the state penitentiary. As explained in the Commentary to § 5-1-106, the Code abolishes the rule of statutory construction that "imprisonment in the penitentiary" defines felony offenses while "imprisonment" refers to misdemeanors. Since that distinction is no longer important, "imprisonment" is now defined to mean incarceration in either a state or local detentional facility.

1988 Supplementary Commentary to § 5-4-101

The definitions of "suspension" and "probation" are ambiguous as to the exact procedure to be followed by a court when a defendant tenders a plea of guilty. Prior to the enactment of the Code, a court to whom a guilty plea was tendered could defer acceptance of the plea and release the defendant without pronouncement of sentence. This procedure was sometimes referred to as "court probation." See

Cantrell v. State, 258 Ark. 833, 529 S.W.2d 136 (1975). Court probation is probably no longer a sentencing alternative open to the trial court. See *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1982) and *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983) which are discussed in more detail in the supplementary commentary to § 5-4-104.

Original Commentary to § 5-4-102

Ideally, before imposing sentence, the court should consider a range of factors bearing on the defendant and his conduct. This section enables a judge to obtain the additional information necessary for a proper sentencing decision. Although it is hoped that pre-sentence reports will eventually become the rule in Arkansas courts, subsection (a) makes their use discretionary.

Section 3 of Act 818 of 1973 [§ 16-90-102] provides for the appointment and payment of pre-sentence officers. Subsection (b) clarifies the duties of these officers, but it also authorizes a court without a pre-sentence officer to appoint a person to discharge these duties.

Subsection (c) makes it possible for the

court, in an appropriate case, to obtain a psychiatrist report on the offender before making a sentencing determination. Such a report might persuade the court that remanding a defendant to the probate court for civil commitment, or suspension or probation conditioned on the defendant undergoing psychiatric treatment, is a more appropriate disposition than imprisonment.

Although a defendant does not have a right to confront witnesses against him on the question of sentence, subsection (d) provides some protection against the use of inaccurate information by permitting the defendant to controvert the facts and conclusions on which the judge bases his sentencing decision.

1988 Supplementary Commentary to § 5-4-102

The cases reported to date involving this section demonstrate the broad range of information that the Court may consider in imposing sentence. In *Noland v. State*, 265 Ark. 764, 580 S.W.2d 953 (1979), the Court found the defendant guilty of theft of property and then allowed the defendant to take a polygraph examination to be considered solely for the purpose of sentencing. Following a report from the examiner that the defendant did not tell the complete truth during the examination, the court imposed a two year sentence to imprisonment. The defendant argued on appeal that the Court should have reviewed the examination in depth to determine which questions and answers indicated deception. The Supreme Court disagreed, noting that the defendant made no effort to controvert the report.

In *Nash v. State*, 267 Ark. 870, 591 S.W.2d 670 (Ct. App. 1979), before sentencing a defendant convicted of delivery of a controlled substance, the Court considered memoranda from the Little Rock Police Department and the Department of Justice indicating that they had information from confidential sources linking the defendant to the distribution of heroin. The defendant made no effort to controvert the reports. The Court of Appeals held that it was appropriate for the court to consider such information for the purpose of imposing sentence.

There are limits, however, on the information that may be considered by the trial court in imposing sentence. In *Parker v. State*, 265 Ark. 134, 577 S.W.2d 414 (1979), the trial court fixed the punishment of the defendant after the jury was unable to agree on punishment. Before doing so, the trial judge asked his probation officer to question individual members of the jury to determine what they thought would be an appropriate sentence. The Supreme Court condemned the practice, stating that the secrecy and freedom of the jury's deliberations would be jeopardized if jurors knew in advance that they might be questioned.

Although § 5-4-102 is limited by its own terms to cases in which punishment is fixed by the court, there is nothing in the section or elsewhere in the Code that prohibits a court from ordering an investigation before it decides whether to suspend the imposition of sentence or place the defendant on probation. Compare, *Lingo v. State*, 271 Ark. 776, 610 S.W.2d 580 (1981), in which the court took the defendant's prior criminal record into account in declining to follow the jury's recommendation that a portion of the sentence imposed by the jury be suspended.

Nothing in § 5-4-102 requires the court to make use of a pre-sentencing investigation. *Brown v. State*, 278 Ark. 604, 648 S.W.2d 67 (1983).

Original Commentary to § 5-4-103

By vesting primary sentencing authority in the jury, this section restates earlier law. See, Ark. Stat. Ann. § 43-2306 (Repl. 1964). The only change is found in subsection (b)(4), which expressly authorizes

judge sentencing when both the prosecution and defense agree. Even this modification merely grants explicit statutory recognition to a practice that was probably permissible under prior law.

1988 Supplementary Commentary to § 5-4-103

According to *Killman v. State*, 274 Ark. 422, 625 S.W.2d 489 (1981), the fact that the jury determines punishment does not mean that the defendant may offer evidence of mitigating circumstances for the jury's consideration that bear only on the question of punishment. Such evidence is properly presented to the trial court which has the responsibility of determining whether to suspend imposition of sentence

or place the defendant on probation once the maximum punishment has been fixed by the jury. See § 5-4-301. In *Killman* the Court upheld the trial court's exclusion of testimony by the defendant's psychiatrist to the effect that the defendant was not a violent person and was not a danger to society and, therefore, was not in need of rehabilitation.

Original Commentary to § 5-4-104

Section 5-4-104 sets out a comprehensive list of the dispositions available to the sentencing court.

Subsection (a) makes it clear that the disposition of a defendant convicted of any offense, whether defined by this Code, another statute, or a municipal ordinance, is governed by the provisions of this article. Subsection (b) renders subsections (c) and (d) inapplicable to capital offenses, since imposition of the death penalty is the subject of a separate chapter. Subsection (c) describes the sentencing alternatives ordinarily available to the court.

Subsection (d) permits the judge in a non-capital case to either suspend the imposition of sentence or to place the defendant on probation. These alternatives were available under prior law. See preexisting law at Ark. Stat. Ann. §§ 43-2324 (Repl. 1964). Also, see § 16-93-401. The Code does not authorize suspension of execution of sentence, a procedure previously permitted by Ark. Stat. Ann. § 43-2326 (Repl. 1964). [See § 16-90-115.] Suspending pronouncement of sentence under § 43-2324 appears to have been a far more common practice among Arkansas judges than pronouncing sentence and suspending execution pursuant to § 43-2326. [See § 16-90-115.] (Compare annotations to the statutes.) Furthermore, the Supreme Court has ruled that there is no substantive distinction between the two procedures. *Canard v. State*, 225 Ark. 559, 283 S.W. 2d 685 (1955). Since pronouncing sentence and then suspending execution

appears to have required entry of a judgment of conviction, a practice that the Code seeks to discourage in cases where suspension is appropriate, subsection (d) authorizes only the suspension of imposition of sentence.

Although very few states provide for a sentence to imprisonment followed by suspension as to an additional term of imprisonment, the Commission felt obliged to authorize this sentencing alternative in view of its previous widespread employment by Arkansas judges. However, subsection (d) prohibits a sentence to imprisonment followed by a period of probation. A person released from prison should be subject to the supervision of parole officials. Supervision by both the court and the Board of Pardons and Paroles is a needless duplication of effort, conducive to jurisdictional disputes. If a judge wishes to place an offender on probation while subjecting him to some imprisonment at the local level, he may utilize the procedures of § 5-4-304.

Subsection (d) also forbids suspension or probation if the defendant is a habitual offender. Since it is difficult to imagine a case in which a person with two prior felony convictions deserves suspension or probation, the provision should not unduly restrict the sentencing alternatives available to the court.

Subsection (e) is a precautionary measure ensuring that subsection (a) does not abrogate penalties other than a fine or imprisonment.

1988 Supplementary Commentary to § 5-4-104

Class Y Felonies

In 1981 the General Assembly amended the Code to create a new class of felony — Class Y — and reclassified murder in the first degree (§ 5-10-102), kidnapping (§ 5-11-102), rape (§ 5-14-103), and aggravated robbery (§ 5-12-103) as Class Y felonies. One effect of the reclassification was to increase the minimum penalty for the more serious Class A felonies. A chart comparing the penalties under the former law and under present law is included in

the supplementary commentary to § 5-4-401. In addition, subsection (d), which is former subsection (c), and subsection (e), which is former subsection (d), were amended so as to make clear that a sentence to imprisonment was the only penalty for conviction of a Class Y felony. Other sentencing alternatives, such as suspension, probation, and a fine, are no longer available in the case of a Class Y felony.

Act 409 of 1983 made additional

changes to § 5-4-104. The net effect of these changes is to treat treason (§ 5-51-201) and murder in the second degree (§ 5-10-103) as offenses for which suspension, probation, or a fine are not sentencing alternatives.

Class Y Felonies: Suspension and Probation Prohibited

The Arkansas Supreme Court has held that § 5-4-104(e)(1) prohibits suspension of imposition of a portion of a sentence for a class Y felony. *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986).

In *Campbell*, defendant was sentenced to fifty years — ten years in excess of the time permitted by law for a class Y felony — with fifteen years suspended. The Court held that appellant could not properly be sentenced to fifty years and that after the trial judge modified the sentence to thirty-five years at a Rule 37 proceeding, appellant was not entitled to have the fifteen years suspended under the original sentence applied to the thirty-five year sentence, leaving him with twenty years to serve. Although § 5-4-104(e)(3) ordinarily permits a court to “sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment,” the *Campbell* decision may mean that a trial court cannot impose a sentence of ten years and suspend imposition of an additional thirty year sentence in class Y cases. The *Campbell* decision may also mean that in proceedings under § 16-90-115 the court cannot sentence a defendant to the class Y ten year minimum sentence with five years of that sentence suspended. Neither can the court sentence the defendant to thirty years with ten years suspended, leaving a total sentence to be served of twenty years, even though twenty years is within the permissible sentencing range and the twenty year sentence without reference to a suspension would be unexceptionable.

On resentencing — pursuant to a Rule 37 petition to correct an unlawful initial sentence for instance — the trial court may impose any sentence it could have lawfully imposed at the outset. *Campbell v. State*.

Suspension and Probation

Subsection (e) of § 5-4-104, which was subsection (d) of the original Code, has led

to confusion over the sentencing alternatives open to the trial court. Prior to the enactment of the Code, the trial judge who did not want to impose a sentence had several alternatives. He could *suspend imposition of sentence*. Ark. Stat. Ann. § 43-2324 (Repl. 1977). He could impose a sentence and then *suspend execution of the sentence*. Ark. Stat. Ann. §§ 43-2326 and 43-2331 (Repl. 1977). [See §§ 16-90-115, 16-93-401.] And when a guilty plea was tendered, he could avoid sentencing the defendant by *deferring acceptance of the plea of guilty*. This last procedure, which was sometimes referred to as “court probation,” was judicially created. See *Cantrell v. State*, 258 Ark. 833, 529 S.W.2d 136 (1975) and *Maddox v. State*, 247 Ark. 553, 446 S.W.2d 210 (1969).

The first sentence of subsection (e) gives the court two sentencing alternatives: it can suspend imposition of sentence or it can place the defendant on probation. Both procedures are defined in § 5-4-101 as release without “pronouncement of sentence.” The only difference between the two is that probation is with supervision. As indicated in the original commentary to § 5-4-104, the drafters intended to eliminate the practice of imposing sentence and then suspending execution. Although §§ 43-2326 [see § 16-90-115] and 43-2331 [see § 16-93-401] were not specifically repealed by the Code, the Supreme Court held in *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980), that the two sections were repealed by implication to the extent they authorized the trial court to suspend execution of sentence. See also, *Adams v. State*, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980). Thus, in 1980 it was clear that the trial court could not suspend execution of sentence. It could suspend imposition of sentence and release the defendant either with or without supervision. *Jefferson v. State*, 270 Ark. 909, 606 S.W.2d 592 (1980).

The General Assembly then confused matters by passing Act 620 of 1981. Act 620 readopted § 41-2326 by authorizing trial courts to “suspend the *execution of jail sentences* or the imposition of fines, or both, in all criminal cases, pending before said courts.” [See § 16-90-115.] The Act also readopted § 43-2331 [§ 16-90-401] but changed the phrase “the court may suspend imposition or *execution of sentence*” to “the court may suspend imposi-

tion of sentence." In addition, Act 620 readopted § 5-4-104(a) which provides that no defendant shall be sentenced otherwise than in accordance with Chapter 4 of the Criminal Code. Four years later the General Assembly enacted Act 956 of 1985, now codified as Ark. Code Ann. § 16-90-115 (1987), in effect overruling the *Culpepper* decision by explicitly permitting trial courts to suspend execution of sentences as an alternative to suspending imposition of sentences. Then, Act 487 of 1987 reenacted § 5-4-104(a), which states that no defendant shall be sentenced "otherwise than in accordance with this chapter." Arguably, the 1987 statute impliedly repealed any statutory authority permitting suspension or probation on terms other than those explicitly authorized by §§ 5-4-101(1)-(2) and 5-4-104(e). Imposing sentence and suspending execution may no longer be permitted. But see *Ross v. State*, 22 Ark. App. 232, 233, 738 S.W.2d 112 (1987) ("A court now has the authority to suspend execution of sentences under the same circumstances as required for suspending imposition of sentence") (case decided before Act 487 enacted). See, also, *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986) (by enacting Code, Legislature impliedly repeals conflicting provisions.)

There seems little doubt about the effect of the Code on the power of the trial court to grant "court probation" by deferring acceptance of a plea of guilty. In *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1982), the Supreme Court held that "apart from statute (the) common law 'court probation' procedure is no longer available as a sentencing alternative." See, also, *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983) ("The trial court, as a matter of law, did accept the plea because the statutory form of probation ended local forms of court probation." *Id.* at 434, 645 S.W.2d at 957); *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986).

The confusion regarding the sentencing alternatives available to the trial court has caused problems under two other sections of the Code. See the supplementary commentary to § 5-4-501, which discusses the effect of a suspension or proba-

tion on exposure to punishment as an habitual offender, and § 5-4-309, which discusses the sentence that can be imposed when the trial court revokes a suspension or probation.

Imposing Fine and Probation

Under Ark. Code Ann. § 5-4-104(2) (1987) the sentencing court may impose a fine and place defendant on probation. *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986). The "or" near the end of the sentence does not make the sentence read disjunctively to permit either (1) a fine plus suspension or (2) probation, but not a fine and probation.

Suspended Imposition of Sentence Following Term of Imprisonment

The Arkansas Court of Appeals has explicitly found that Ark. Code Ann. § 5-4-104(3) (1987) permits the trial court to impose a sentence of imprisonment followed by suspended imposition of sentence to an additional term of imprisonment. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986). The court rejected the argument made in conference by some of its members that Ark. Code Ann. § 5-4-304 (1987) "provides the only method by which a court can order a defendant to serve a period of incarceration to be followed by a period of suspended imposition as to an additional term." *Id.* at 159, 713 S.W.2d at 245. The *Smith* opinion also lists the trial court's options upon accepting a guilty plea. *Id.* at 162-63, 713 S.W.2d at 247.

Revocation of Probation After Fine Imposed and Paid

Although a fine is a "sentence" under § 5-4-104, payment of the fine does not constitute "serving the sentence imposed" under § 16-93-402(e)(5). Probation imposed simultaneously with the fine can be revoked. A defendant who is fined and placed on probation is subject to probation revocation for violation of conditions of probation. *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986).

Whether a fine constitutes a "sentence imposed" is a question that does not arise in a revocation proceeding under § 5-4-309, since no sentence is ever imposed under the code approach. §§ 5-4-101, 104.

Original Commentary to § 5-4-201

Virtually all misdemeanors and a substantial number of felonies were previously punishable by a fine in addition to or in lieu of imprisonment. The Code provides for the imposition of a fine for all the offenses it defines. The maximum fine authorized for a particular offense is keyed to the classification of the offense since the arguments for a limited number of sentencing ranges, as advanced in the Commentary to § 5-4-401, are equally persuasive with respect to fines. Although higher than the average maximum fine under current law for comparable conduct, the limits established by this section are believed to be more realistically attuned to the contemporary value of the dollar.

In empowering courts to impose fines for all Code offenses, the Commission was not unmindful of the various criticisms levelled at this type of criminal sanction. Depending on the financial resources of the defendant, fines may have little deterrent effect, and their rehabilitative potential is slight in most cases. Fines often punish the family of a defendant more than the defendant. Finally, in some localities the prospect of the additional public revenue generated by fines has unfortunately distorted the entire criminal process. The Commission considered adopting criteria for the imposition of fines but rejected this approach since any guidelines flexible enough to give the court the discretion it needs would necessarily be too general to adequately deal with the problem. Another way to ensure that the authority to impose fines is not abused is to limit fines to particular offenses or classes of offenses. However, this alternative is also unsatisfactory since it ignores the exceptional case where a fine is the most effective way to deal with the particular offender. Therefore, the Commission elected to rely on the maximum limits established by this section; the natural limits imposed by the offender's ability to pay; and the excessive fine prohibition of article 2, section 9 of the Arkansas Constitution to control the power to impose fines.

Subsection (a) (3) acknowledges the power of the legislature to set different

fine limits for a particular felony. Subsections (b) (4) and (c) (2) accomplish the same function with respect to misdemeanors and violations. These subsections also preserve intact the present limits on fines prescribed by statutes outside the Code. To the extent that pre-existing felony statutes have been amended to bring them within the Code classification system, the maximum fine that can be upon conviction of such felonies has been changed. All prior misdemeanors that prescribed a maximum fine carry the same penalty under the Code. Former statutory authority provided that a misdemeanor statute that prescribed no limits on fines was punishable by a maximum fine of \$250. See prior law formerly found at Ark. Stat. Ann. § 41-106 (Supp. 1973). Under § 5-1-107(c), an offense denominated a misdemeanor without specification as to class or penalty of imprisonment is a class A misdemeanor for Code purposes. Therefore, § 5-4-401(b)(3) has the effect of raising the maximum fine for such misdemeanors to \$1000.

Subsection (d) is directed at a situation where a fine has an obvious deterrent potential since one means to discourage criminal conduct based on a pecuniary motive is to deprive the defendant of all conceivable profit. The fact that any restitution to the victim diminishes the total possible fine provides encouragement for such action.

The Commentary to the provision imposing liability on an organization for the acts of an agent discusses the pros and cons of such authority and indicates in a general way the appropriate criteria for imposing the only feasible sanction in such cases, other than a court ordered dissolution. When imposition of a fine on an organization is appropriate, it is likely that the limits of subsections (a), (b) and (c) will be too low to produce the desired effect. Therefore, subsection (e) doubles the ordinary penalties when the defendant is an organization. Note that the fine authorized by subsection (d) is not doubled — i.e., an organization may not be sentenced to pay a fine that is four times its gain.

1988 Supplementary Commentary to § 5-4-201

As explained in the supplementary commentary to §§ 5-4-104 and 5-4-401, the 1981 General Assembly created a new class of felony called Class Y which carries a greater minimum sentence to imprisonment upon conviction. Since no corre-

sponding change was made to § 5-4-201, a person convicted of a Class Y felony is not subject to punishment in the form of a fine.

See AMCI 5001, 5009, 6100.

Original Commentary to § 5-4-202

Subsection (a) codifies *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971), which held that a sentence to imprisonment for non-payment of a fine worked an invidious discrimination against indigent defendants in violation of the Equal Protection Clause. The subsection also precludes holding an offender sentenced to a fine and imprisonment past the term of imprisonment because he fails to pay this fine. See, *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970). Since the principle of these two decisions seems equally applicable to imprisonment for non-payment of costs, the section prohibits that procedure. This

section does not, however, prevent a court that has sentenced a defendant to pay a fine and ordered suspension or probation as to imprisonment from revoking the suspension or probation if the defendant contumaciously refuses to pay the fine.

Subsection (b) authorizes the court to defer payment of a fine or to permit a defendant to pay a fine in installments. It is taken from M.P.C. § 302.1(1). Both *Tate v. Short* and *Williams v. Illinois* recommended these procedures as alternatives to imprisonment for enforcing the payment of fines and costs. See, also, *Cherry v. Hall*, 251 Ark. 305, 472 S.W. 2d 225 (1971).

Original Commentary to § 5-4-203

The Court in *Tate v. Short* stated: "We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S. at 400, 91 S. Ct. 672, 28 L. Ed. 2d at 134. Section 41-1103 sets out a procedure for the imprisonment of a financially able defendant who refuses to pay a fine or costs. It is patterned after M.P.C. § 302.

The maximum limits on imprisonment are set at one day per ten dollars of fine, or one year in the case of a felony and thirty days in the case of a misdemeanor. Implicit in subsection (b) is the proposition that payment of the fine or costs will lead to the defendant's release from imprisonment. Similarly, service of the term of imprisonment discharges the fine or costs.

Subsection (d) ensures that a corpora-

tion does not escape a sentence to pay a fine because of confusion as to what person or persons within the corporate hierarchy may disburse corporate funds to pay the fine. Corporate officers or directors may be imprisoned only for failure to authorize payment. The officers and directors are not individually liable for the payment of fines assessed against the corporation. Therefore, if payment is authorized, officers and directors are not subject to imprisonment because the corporation lacks sufficient assets to pay the fine. Subsection (d) has no application whatsoever to an officer or director who is convicted in an individual capacity and sentenced to pay a fine for acts done on behalf of a corporation. Such a person is personally liable for the fine and may be imprisoned for its non-payment in accordance with subsections (a) and (b).

1988 Supplementary Commentary to § 5-4-203

There have been no significant developments regarding this section since the enactment of the Code. See the supplementary commentary to § 5-4-309 for a

discussion of the applicability of this section to revocation of a suspension or probation due to failure to pay a fine.

Original Commentary to § 5-4-204

Subsection (a) restates present law by authorizing the collection of fines or costs through civil process. For pre-existing law see, Rev. Stat., Ch. 45, § 203 and Criminal Code § 296 indexed as Ark. Stat. Ann. § 43-2404 (Repl. 1964).

Under subsection (b) reference is again made to the civil statutes for the law governing attachment of liens. The earlier rules governing when a judgment to pay a fine or costs constituted a lien on real and personal property were found in Ark. Stat. Ann. § 43-2403 (Repl. 1964). The Com-

mission perceived no reason why the effect on a defendant's property of a judgment to pay a fine or costs should be any different from the effect generated by a civil judgment. Moreover, § 43-2403 did not fully protect the interests of innocent third parties since it created a lien on real and personal property from the time of arrest rather than the time judgment was entered and created a lien on personal property even though the property was left in the hands of the judgment debtor.

Original Commentary to § 5-4-301

Section 5-4-301, and subchapter 3 of chapter 4 generally, must be considered against the background of two other acts dealing with suspension and probation that were passed during the 1975 session of the General Assembly—Act 346 and Act 378. The applicability of these acts is more limited than Subchapter 3. For example, suspension and probation under Act 346 is available only to a first offender; the alternatives to imprisonment provided by Act 378 can be employed only if the defendant is less than 26 years of age and has not been convicted of certain enumerated offenses. Subchapter 3, on the other hand, is available to all except persons convicted of the most serious felonies or habitual offenders. It is also far more comprehensive, dealing in detail with matters such as revocation of suspension or probation which are not considered in the other acts. Both Act 346 and Act 378 provide for expungement of records following successful completion of a period of suspension or probation. Subchapter 3 did not adopt this approach to giving the defendant a clean record for the reasons stated *infra*.

A more detailed discussion of the provisions of Acts 346 and 378 is beyond the scope of this Commentary. The two acts do overlap to a considerable degree with Subchapter 3, and it is difficult to predict at

this point how the three will be construed to interrelate. Hopefully, the three acts will be found to be compatible, thus offering sentencing courts alternative procedures for suspension and probation.

Section 5-4-301 is taken from M.P.C. § 301.1.

Subsection (a), in addition to reiterating the court's power to suspend or probate, lists criteria that the court should consider in determining whether suspension or probation, on the one hand, or imprisonment, on the other, is the more appropriate disposition.

The first paragraph of § 5-4-301 was amended twice by the 1977 General Assembly. The second sentence of subsection (a) as originally enacted read: "The court shall not suspend imposition of sentence or place a defendant on probation if it is determined, pursuant to section 1005 [§ 5-4-502], that the defendant has previously been convicted of two or more felonies." This sentence was amended by Act 474 of 1977 to restrict the trial court's authority to suspend imposition of sentence or place on probation a defendant who has previously been *found guilty* of two or more felonies, since the original version of this subsection imposed such restrictions only where the trial court found that the defendant had been *con-*

victed of two or more felonies. As a result, one who had been found guilty — but not convicted — of a dozen felonies was nonetheless a candidate for probation upon conviction of another felony offense. Although as a practical matter this type of situation did not pose serious problems, a provision eliminating any potential for abuse seemed preferable to the Code's original phrasing.

Subsequently, Act 482 of 1977 was passed, adding the following language to § 5-4-301:

"(1) If a defendant pleads or is found guilty of an offense other than capital murder, *murder in the first degree, murder in the second degree, first degree rape, kidnapping or aggravated robbery*, the court may suspend imposition of sentence or place the defendant on probation. The court shall not suspend imposition of sentence or place a defendant on probation if it is determined, pursuant to Section 5-4-502, that the defendant has previously been convicted of two or more felonies. In making a determination as to suspension or probation, the court shall consider whether" (Emphasis added.)

Consequently, Act 482 may re-establish the "conviction" requirement of the original section. However, it is to be hoped that Acts 474 and 482 will be construed to give maximum effect to the provisions of each pursuant to authority such as *Roachell v. Gates*, 185 Ark. 350, 47 S.W.2d 35 (1932); *Cordell v. Kent*, 174 Ark. 503, 295 S.W. 404 (1927); and *Arkansas Railroad Comm. v. Stout Lumber Co.*, 161 Ark. 164, 255 S.W. 912 (1923), establishing special rules of construction regarding acts passed at the same legislative session.

Subsection 5-4-301(b)(4) was also added by Act 482.

Subsection (c) sets out more specific factors that a court should consider when making a disposition. By suggesting mitigating circumstances to which the defendant can call the court's attention, the Commission hopes to encourage the use of suspension or probation as alternatives to imprisonment. The proposed section, however, states no preference either for or against suspension or probation. The final decision as to the most appropriate disposition is committed, as under present law, to the sound discretion of the trial court. Cf., *Smith v. State*, 241 Ark. 958, 411 S.W.2d 510 (1967).

Subsection (d) excepts two situations from the general rule that a judgment of conviction is not to be entered when a court orders suspension or probation. The first is when the court fines the defendant and suspends or probates him only as to imprisonment. The court must enter a judgment of conviction if it is to have a basis for imposing a fine. Furthermore, the defendant who is found guilty of an offense and sentenced to pay a fine only has clearly been "convicted" of the offense. The result should not be different when the court fines the defendant and suspends imposition of sentence or places him on probation as to imprisonment. The second exception to the general rule arises when the court imposes a sentence to imprisonment followed by suspension as to an additional imprisonment. Again, the court must enter a judgment of conviction if there is to be a basis for imposing the sentence to imprisonment.

The court that wishes to enter a judgment of conviction in conjunction with a suspension or probation may simply enter judgment and sentence defendant to a \$1 fine or one day prison term, thus complying with the requirements of subsection (d). This course of action might be desirable, for example, if a "conviction" is a prerequisite to an ancillary civil sanction such as revocation of a license. Though requiring the judge to impose a nominal sentence when he enters a judgment of conviction appears to elevate form over substance, the procedure does have the advantage of encouraging the judge to consider whether the defendant deserves a conviction of record and should prevent the routine entry of judgments of conviction when suspension or probation is appropriate.

In *State Medical Bd. v. Rodgers*, 190 Ark. 266, 79 S.W. 2d 83 (1935), the Supreme Court held that a person whose sentence is suspended has not been convicted of an offense. Section 7 of the Controlled Substances Act (Act 590 of 1971, previously indexed as Ark. Stat. Ann. § 82-2623 (Supp. 1973)) provides that a first offender thereunder shall be placed on probation "without entering a judgment of guilt." The rationale underlying both the *Rodgers* case and the Controlled Substances Act is that a person deemed worthy of suspension or probation should not have his record marred by a conviction.

tion. One way to implement this rationale would be to provide for expungement of all records upon successful completion of suspension or probation. As previously mentioned, Acts 346 and 378 of 1975 adopt this approach. However, expungement will be effective only if properly supervised to ensure that courts and law enforcement agencies comply with the duty to purge their files. Furthermore, expungement is defined in both Acts to mean sealing rather than destruction of records, and "expunged" records are available to law enforcement and judicial officials. Thus, a person who successfully completes a suspension or probation will still have a "record" in spite of the fact that

he has never been "convicted" under Arkansas law. The Commission felt that the more effective way to ensure that a suspended or probated offender received a meaningful second chance was to apply the procedures of the Controlled Substances Act to all suspensions and probations. The court should not enter a judgment of conviction and, if defendant complies with the conditions imposed upon him for the period of suspension or probation, the proceedings against him should be dismissed. This is not to say, however, that a court utilizing the procedures of § 5-4-301(d) cannot, as an additional precaution, order the records expunged.

1988 Supplementary Commentary to § 5-4-301

"First Degree Rape" Exception to § 5-4-301

The "first degree rape" language of § 5-4-301(a)(1) has given rise to confusion. The reference is to an offense superseded by the 1976 enactment of Ark. Stat. Ann. § 41-1803 [§ 5-1-103 (1987)]. Reference to the non-existent offense of "first degree rape," was inadvertently carried forward

by § 5-4-301. Dodging the argument that a post-1976 conviction of rape falls outside the § 5-4-301 probation prohibition, the Court of Appeals has held that rape is a class Y felony and that one convicted of a class Y felony *must* be imprisoned as provided by § 5-4-104(c). *Harris v. State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985).

Original Commentary to § 5-4-302

Section 5-4-302 makes it clear that Chapter 4 does not abolish any procedures for suspension or probation specially adapted to a particular type of offense or defendant. Thus, a court is free to suspend

or probate an eligible defendant pursuant to the Controlled Substances Act (Ark. Stat. Ann. § 82-2623 (Repl. 1976)) [§ 5-64-407], Act 346 of 1975, or Act 378 of 1975.

Original Commentary to § 5-4-303

Subsection 5-4-303(a) authorizes the court to attach reasonable conditions to a suspension or probation. Preexisting law was in accord. Ark. Stat. Ann. § 43-2324 (Repl. 1964) [suspension — "upon such conditions as (the court) shall deem proper and reasonable"], § 43-2331 (Supp. 1973) (prohibition — "upon such conditions and terms as the court deems best.") The second sentence requires that every suspension or probation be subject to revocation if the defendant commits another offense punishable by imprisonment. The proposed language excludes minor offenses, since a traffic violation should not be grounds for revocation in the ordinary case. However, nothing in the Code prevents the court from making it a

condition of suspension or probation that defendant not commit even minor offenses. Currently, most courts condition a suspension or probation on defendant's "good behavior." The proposed language will provide a more definite standard of conduct for the suspended or probated defendant.

Subsection (c) suggests to the court possible conditions of suspension and probation. The list represents a composite of the conditions contained in M.P.C. § 301.1(2) and Proposed Federal Code § 3103(2).

Act 474 of 1977 clarified the trial court's authority under subsection (c)(4). As amended, subsection (c)(4) precludes commitment to an institution or compelling another person to treat a probationer *as a*

condition of probation. The amendment does not affect the court's authority to commit for observation where insanity is a defense.

Since the distinction between suspension and probation is whether supervision is exercised over defendant, imposition of the conditions listed in subsection (d) makes the release a probation.

Subsection (e) ensures that the defendant is aware of the conditions to which he must conform his future conduct. Al-

though previous law did not require that the defendant be furnished with a written list of conditions, the Supreme Court has expressly endorsed such a procedure. *Gerard v. State*, 235 Ark. at 1018, 363 S.W.2d at 918 (1963).

Act 482 of 1977 amended § 5-4-303 by adding subsection (f), clarifying both the procedures to be followed pursuant to entry of an order under subsection (c)(8) and the scope of authority conferred on the court by subsection (c)(8).

1988 Supplementary Commentary to § 5-4-303

Written Conditions of Suspension and Probation

The requirement of subsection (e) that the trial court provide the defendant with a written statement setting forth the conditions of suspension or probation has been strictly construed. In *Ross v. State*, 268 Ark. 189, 594 S.W.2d 852 (1980), the Supreme Court reversed a revocation in which the trial court failed to comply with the requirement. See also, *Neely v. State*, 7 Ark. App. 238, 647 S.W.2d 473 (1983). *Ross* overruled an earlier Court of Appeals decision holding that advising the defendant in open court of the conditions of suspension or probation constituted substantial compliance with subsection (e). See *Thornton v. State*, 267 Ark. 675, 590 S.W.2d 57 (Ct. App. 1979).

Failure to Make Restitution

Act 315 of 1985 added the last sentence of subsection (f). Presumably, revocation proceedings under § 5-4-303(f) will be conducted pursuant to constraints imposed by § 5-4-309. See Supplementary Commentary to § 5-4-309. See also § 5-4-203 and the commentary thereto which recognize constitutional restrictions on imprisoning a defendant for failure to pay a fine. See also *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984) which cites *Bearden v. Georgia*, 461 U.S. 660 (1983) for the proposition that failure to pay a fine or restitution can be punished by imprisonment only where the State can prove that the probationer failed to make bona fide efforts to do so.

Probation Conditions

In *Young v. State*, 286 Ark. 413, 692 S.W.2d 752 (1985) the defendant was convicted of indecent exposure charged under

§ 5-14-112(a)(1). The trial court suspended imposition of sentence for one year, imposing as probation conditions that defendant not pose nude for commercial exploitation or "in bars or beer joints." *Id.* at 417, 692 S.W.2d at 754. On appeal the Arkansas Supreme Court acknowledged that § 5-4-303(c) conditions are subject to constitutional limitations. Holding that "a condition of a probation or suspension is not necessarily invalid simply because it restricts a probationer's ability to exercise constitutionally protected rights, *id.* at 418, 692 S.W.2d at 755, the Court nonetheless went on to find that a probation condition prohibiting nude displays for "commercial exploitation" was "too broad, vague, and insufficiently tailored to bear a reasonable relationship to probation/suspension objectives of rehabilitation and future criminality." *Id.* at 419, 692 S.W.2d at 755. The Court went on to discuss and by implication adopt the following standard drawn from *United States v. Tony*, 605 F.2d 144 (5th Cir. 1979):

The [probation] conditions must be "reasonably related to the purposes of the act." Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.

286 Ark 418, 692 S.W.2d at 755.

Court Lacks Jurisdiction to Suspend Sentence After Execution Begun

In a case removed from the Court of Appeals after certification as involving an

issue of significant public importance, the Arkansas Supreme Court has disapproved of “furloughs.” *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987). Appellant was convicted of criminal trespass under § 41-2004 [§ 5-39-203] and sentenced to sixty days in jail by the trial court. After serving eight days of the sentence, she was “admonished to good behavior” and released from jail. *Davis* at 192, 723 S.W.2d at 367. Several months later a motion was filed to revoke appellant’s suspended sentence, and the trial court revoked appellant’s “furlough” and directed that she serve the balance of her sentence. The Arkansas Supreme Court

held that the circuit court had no authority to grant the original “furlough” or to suspend a valid sentence once execution had begun. The Court also interpreted *Coones v. State*, 280 Ark. 321, 657 S.W.2d 553 (1983) to adopt the rule that a trial court lacks jurisdiction to enter any order subsequent to its original sentence. Since the original sentence in the case at bar remained in force, the order returning appellant to jail was upheld. Justices Holt, Hickman, and Purtle dissented, opining that the trial judge had no jurisdiction to alter the sentence and that it had expired on its face.

Original Commentary to § 5-4-304

Many Arkansas judges have previously used the shock of a short period of incarceration to enhance the effectiveness of a subsequent period of suspension or probation. In addition to providing explicit statutory recognition of this procedure, subsection (a) authorizes the court to order split periods of confinement. Intermittent imprisonment will permit an offender to keep his job while spending his nights or weekends in jail. It will also enable the court to control the offender’s conduct at critical times. Although the subsection contemplates the use of intermittent imprisonment in conjunction with suspension or probation, nothing in this section affects the inherent power of a court to order split sentences without suspending sentence or placing the defendant on probation. The subsection departs from the rules established in two preceding sections of this Article. Contrary to the procedure of § 5-4-402, it allows a person found guilty of a felony to be incarcerated in the county jail. This is obviously necessary in the case where the judge wishes to order split terms of confinement. By authorizing such a procedure, the Commission also hopes to encourage the use of local facilities when the court wishes to give an offender a “taste” of imprisonment. Secondly, § 5-4-103’s prohibition of imprisonment followed by probation by its own terms does not preclude confinement followed by probation pursuant to this section. The purpose of that prohibition never comes into play since control of the offender never passes to state authorities

when the procedures of this section are employed.

It should be noted that the court is not limited to ordering confinement in a detentional or correctional facility. Subsection (a) also contemplates the use of “rehabilitative facilities.” Thus, a defendant can be directed to reside at a “half-way house” as a condition of suspension or probation.

Subsection (b) is necessary to ensure that use of this section does not undermine the fundamental goal of giving the suspended or probated offender a “clean slate.” In the absence of subsection (b), the court would be required by § 5-4-301(d)(2) to enter a judgment of conviction before ordering the defendant’s imprisonment. To avoid this result, confinement pursuant to this section is characterized as “a condition of suspension or probation” rather than “a sentence to imprisonment,” thus obviating the need to enter a judgment of conviction.

Since confinement pursuant to this section is designed to give the offender a “taste” of imprisonment, subsection (c) sets limits on confinement sufficiently long to achieve that purpose. The second sentence is obviously drafted with a view toward the offender ordered to spend his nights in jail.

Subsection (d) provides that a person whose suspension or probation is subsequently revoked must receive credit for the time actually spent in confinement as condition of the suspension or probation.

1988 Supplementary Commentary to § 5-4-304**§ 5-4-304 Not Restriction on Suspended Imposition Following more than Ninety Day Term of Confinement**

The Arkansas Court of Appeals has rejected the notion that § 5-4-304 prohibits a trial court from sentencing a convicted felony defendant to more than 90 days

and suspending imposition of an additional term of imprisonment. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

See supplementary commentary to Ark. Code Ann. §§ 5-4-101 to 104.

Original Commentary to § 5-4-305

This section is a precaution against any procedural problems that might arise from the fact that no final judgment of conviction is entered in conjunction with a suspension or probation. Subsection (a)(1) preserves the rights of both the state and the defendant to appeal either the order of suspension or probation, or the underlying

determination of guilt. Since the time for filing notice of an appeal is normally calculated from the date of the *sentence* and entry of *judgment*, the special rule of subsection (b) is necessary. Subsection (a)(2) restates former law found at Ark. Stat. Ann. § 43-2325 (Repl. 1964).

Original Commentary to § 5-4-306

Former law set a five-year limit on probation at Ark. Stat. Ann. § 43-2331 (Supp. 1973). Although it was argued that five years was also the limit on a suspension of imposition of sentence pursuant to § 43-2324 (Repl. 1964), the Supreme Court ruled to the contrary. *Minick v. State*, 256 Ark. 564, 509 S.W. 2d 289 (1974). Pronouncement of sentence could, prior to enactment of the Code, be suspended for a period equal to the maximum term of imprisonment the defendant could have received for the offense. As originally

enacted, the Code limited the period of probation or suspension to five years. However, Act 772 of 1977 reimposed the limitations of former law.

Subsection (b), allowing the court to modify conditions of suspension or probation, restates earlier law with respect to probation. See, Ark. Stat. Ann. § 43-2330 (Supp. 1973). Since the court retains jurisdiction of a case when it suspends imposition of sentence, it also has the power to modify conditions of a suspension.

1988 Supplementary Commentary to § 5-4-306

Subsection (a), as amended in 1977, permits a suspension or probation for a period of time equal to the maximum term of imprisonment applicable to the offense. Prior to 1977 there was a five year limit on probations. Act 620 of 1981 readopted § 43-2331 [§ 16-93-401], which provides

that the "period of probation, together with any extension thereof shall not exceed five (5) years." Since Act 620 had a clause repealing all conflicting laws and parts thereof, the five year limit on probations has apparently been reinstated.

Original Commentary to § 5-4-307

Previous statutory authority was silent as to when a probationary period began to run and provided that a period of suspension began to run from the date of the plea or verdict of guilty. See, former Ark. Stat. Ann. § 43-2324 (Repl. 1964). Subsection (a) starts a period of suspension or proba-

tion on the date the court orders such action. This coincides with the rule that a term of imprisonment begins to run on the day sentence is imposed. Ark. Stat. Ann. § 43-2813 (Supp. 1973) (previous codification).

Subsection (b) prevents the stacking of

periods of suspension or probation. The second sentence provides that a person subject to suspension or probation and imprisonment satisfies both by serving the imprisonment. If the defendant is imprisoned for an offense committed after his sentence was suspended or he was placed on probation, the court will probably revoke the suspension or probation, and sentence him to imprisonment. In such a case, § 5-4-403 will determine whether the prison terms run concurrently or consecutively. However, occa-

sionally a court will suspend or probate a defendant who has other charges pending against him or who has already been sentenced to imprisonment for another offense. In either case, subsection (b) runs the suspension or probation concurrently with the imprisonment.

If defendant is sentenced to imprisonment followed by a suspension, subsection (c) provides that the period of suspension starts to run when defendant is released from imprisonment.

1988 Supplementary Commentary to § 5-4-307

Effective Date of Sentence

In *Standridge v. State*, 290 Ark. 150, 717 S.W.2d 795 (1986), appellant entered a guilty plea to burglary and other felonies on October 2, 1985. He was placed on supervised court probation for one year. Imposition of an additional sentence was suspended for a period of five years. Appellant's efforts to lead a law abiding life failed on October 3, when he committed forgery. The judgment reflecting the suspension was filed on October 8. On the same day a petition to revoke the October

2 suspended imposition of a sentence was filed on other grounds. Later, on November 25, an amended petition to revoke based on the forgery was filed. Appellant argued that his fall from grace had been so swift — it had occurred before judgment was filed on October 8 — that the state was barred from revoking the suspension. The Arkansas Supreme Court rejected the argument, holding that a sentence is in effect from the time it is pronounced in open court, even though it is not filed until later.

Original Commentary to § 5-4-308

This section, taken almost verbatim from the second paragraph of preexisting authority found at Ark. Stat. Ann. § 43-2332 (Supp. 1973), enables a supervising court to transfer jurisdiction over a proba-

tioner to another county. A similar provision with respect to suspension is unnecessary since a suspension, by definition, is a release without supervision.

Original Commentary to § 5-4-309

This section is based on the last three paragraphs of earlier authority found at Ark. Stat. Ann. § 43-2332 (Supp. 1973) [§ 16-93-402]. Though that statute, by its terms, applied only to probation, § 5-4-309 has been extended to cover revocation of a suspension.

Subsection (a) has been modified to allow issuance of a summons in lieu of an arrest warrant. This procedure, which is already employed by some courts, eliminates unnecessary police effort and saves a defendant the inconvenience and embarrassment of a formal arrest.

Subsection (b) is new. Since warrantless arrests for felonies are permitted generally, a warrantless arrest of a person who

violates suspension or probation seems equally justified.

Since a hearing is necessary to revoke a suspension or probation, a defendant could prevent literal compliance with subsection (d) by concealing himself until the period of suspension or probation expires. This problem has not troubled the Supreme Court in the past. See, *Reed v. State*, 241 Ark. 836, 411 S.W. 2d 285 (1967) (period of suspension does not expire when defendant voluntarily absents himself from county and state and cannot be found by officers); *Parkerson v. State*, 230 Ark. 118, 321 S.W. 2d 207 (1959) (suspension can be revoked at hearing postponed until after expiration of sus-

pension period due to defendant's illness). The Commission thought it preferable to set out the action necessary to toll the running of the suspension of probation period. That action — i.e., arrest or issuance of an arrest warrant — is the same as that sufficing to toll the statute of limitations for purposes of § 5-1-109.

If a suspension or probation is revoked, the court should at that time enter a judgment of conviction if a judgment has not previously been entered. Subsection (f) then permits the court to impose any sentence that could have originally been imposed upon the defendant. This was formerly the law with respect to revocation of probation, Ark. Stat. Ann. § 43-2332 (Supp. 1973), and was probably authorized upon revocation of a suspension. *Cf., Maddox v. State*, 247 Ark. 553, 446 S.W.2d 210 (1969). As argued by the drafters of the Model Penal Code: "[I]f a suspension works out badly and sentence is to be imposed, we do not think the nature of the sentence should be predetermined . . .; the causes of the failure of suspen-

sion ought to be before the court before the sentence is determined. It is unsatisfactory, therefore, to limit the sanctions on cancellation of suspension to a sentence previously fixed. . . ." M.P.C. § 6.02, Comment at 12, 13 (Tent. Draft No. 2, 1954). The power to impose any sentence originally authorized is qualified to the extent that a fine or imprisonment was actually imposed at the time suspension or probation was ordered. For example, assume that a defendant is found guilty of a class B felony and the court imposes a fine of \$10,000 and suspends imposition of sentence as to imprisonment. If the defendant is subsequently revoked, he may be sentenced to a term of imprisonment up to 20 years but the maximum fine that can be imposed is \$15,000 (statutory limit for class B felony) less \$10,000 (fine already imposed), or \$5,000. Similarly, if the court had imposed a 5-year term of imprisonment followed by a period of suspension, the maximum sentence upon revocation is 15 years.

1988 Supplementary Commentary to § 5-4-309

See Supplementary Commentary to § 5-4-104

Suspending "Execution" of Sentence

As discussed in the supplementary commentary to § 5-4-104, there has been considerable confusion among trial judges since the adoption of the Code concerning suspension of sentences and probation. Prior to the enactment of the Code a trial judge who did not want to impose a sentence had several alternatives. He could suspend imposition of the sentence for a definite period of time. Ark. Stat. Ann. § 43-2324 (Repl. 1977). He could impose a sentence to a definite period of time and then suspend the execution of the sentence. Ark. Stat. Ann. §§ 43-2326 and 43-2331 (Repl. 1977) [§§ 16-90-115, 16-93-401]. Or he could defer acceptance of a plea of guilty and thereby delay sentencing for a reasonable period of time. *Maddox v. State*, 247 Ark. 553, 446 S.W.2d 210 (1969). Under the two statutory alternatives it was clear that the power of the court to revoke a suspension ended when the period of suspension ended. *Canard v. State*, 225 Ark. 559, 283 S.W.2d 685 (1955). The only limit on the length of

time a court could defer acceptance of a plea of guilty was one of reasonableness. It was less clear but probably also the law under the two statutory sections that upon revocation of suspension the court could not impose a sentence longer than the period of the original suspended sentence. No such limit applied when the court deferred acceptance of a plea of guilty, and the court could later impose any sentence within the limits prescribed for the offense on which the guilty plea was tendered. *Maddox v. State*, *supra*.

Under § 5-4-104(e) the alternatives available to the trial court are to suspend imposition of sentence, which is defined by § 5-4-101(1) as release without pronouncement of sentence and without supervision, or probation, which is defined by § 5-4-101(3) as release without pronouncement of sentence but subject to supervision. Section 5-4-309(e) retained with some minor qualifications the requirement of pre-Code cases that any revocation of suspension or probation occur within the period of suspension or probation originally imposed by the trial court. Section 5-4-309(f) changed prior law, however, by allowing the court that revokes a

suspension or probation to impose any sentence that might have been imposed originally for the offense of which the defendant was found guilty.

Although the Code did not provide for suspending the *execution* of sentence as distinguished from suspending the *imposition* of sentence, some trial courts continued to follow the practice of suspending *execution* of sentence. The Supreme Court held in *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980), that a trial court could no longer suspend the *execution* of sentence, and that the Code repealed by implication both § 43-2326 [§ 16-90-115] and § 43-2331 [§ 16-93-401] to the extent they authorized such a procedure. But the Court further held that when a trial court did erroneously purport to suspend execution of a sentence, the court was limited in the event of a subsequent revocation to imposing the previously suspended sentence. The rationale underlying this result is that the defendant is entitled to know the effect of his sentence and may be led by a suspension of execution of a sentence to believe that execution of the sentence is the most severe penalty that can be imposed for failing to comply with the conditions of the suspension. See also, *Adams v. State*, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980).

To the extent that *Culpepper* held that trial courts could not suspend execution of sentence, it was overruled legislatively by Act 956 of 1985, now codified as § 16-90-115. But, as authority that defendants are entitled to unambiguous notice of the effect of probation and revocation, *Culpepper* very likely survives.

In a pre-Act 956 case, the *Culpepper* rule was applied when a trial court imposed two or more concurrent sentences and then purported to suspend *execution* of the sentences. Upon revocation of the suspension, the court could not order that the revoked sentences run consecutively. *Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ct. App. 1979).

The rule of *Culpepper* applies when the trial court attempts to suspend *execution* of sentence and thereby misleads the defendant as to the consequences of a revocation. If the trial court complies with the Code and suspends imposition of sentence, then it is free to impose any sentence that could have originally been imposed for the offense of which the

defendant was convicted. Moreover, even if the trial court does purport to suspend *execution* of sentence, *Culpepper* does not apply when there is little likelihood that the defendant was misled as to the consequences of failing to comply with the conditions of suspension or probation. For example, in *Jefferson v. State*, 270 Ark. 909, 606 S.W.2d 592 (1980), the court imposed a seven year sentence, and then suspended execution of the sentence and placed the defendant on probation for five years. The Supreme Court upheld a seven year sentence imposed upon revocation of the five year probation since the defendant could not reasonably have believed that five years was the maximum punishment for violation of his probation.

The court in *Culpepper* suggested that the General Assembly may have inadvertently amended § 5-4-309(f) when it passed Act 326 of 1979 (Ark. Stat. Ann. § 43-2332) [§ 16-93-402] dealing with the duties of probation officers. That act requires that a person on probation be taken before the court with jurisdiction over him and that the court may revoke the probation and require him to serve "the sentence imposed, or any lesser sentence which might have been originally imposed." In a subsequent case, however, the court concluded that the General Assembly did not intend to effect any basic changes in probation procedures when it passed Act 326. It held that the term "sentence imposed," as used in the act, presumes that a sentence was imposed. Since pronouncement of sentence is withheld in the case of a suspension or probation, there is no "sentence imposed" to which Act 326 applies. *McGee v. State*, 271 Ark. 611, 609 S.W.2d 73 (1980); *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986). See, also, *Williams v. State*, 280 Ark. 543, 659 S.W.2d 948 (1983).

Revocation for Failure to Pay a Fine

Suspensions or probations are frequently conditioned on the payment of a fine. Section 5-4-203 precludes imprisonment for failure to pay a fine if the defendant shows that the failure was not attributable to a purposeful refusal to obey the sentence of the court or to a good faith effort on his part to obtain the funds required for payment. Section 5-4-203 is not specifically applicable to the revocation of a suspension or probation for fail-

ure to pay a fine. In *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984), the Court of Appeals found it unnecessary to determine whether § 5-4-203 applied to a revocation of a suspended sentence. Based on the United States Supreme Court decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), it held that the trial court must make some inquiry into the reasons for the defendant's failure to pay the fine. In *Brown v. State*, 10 Ark. App. 338, 664 S.W.2d 507 (1984), which was handed down on the same date, the court seemed to hold that the burden was on the defendant to come forward and establish some excusable reason for failure to pay a fine in order to avoid revocation of a suspension or probation. See also, *Cavin v. State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984).

Sentence That May Be Imposed Upon Revocation of Probation Under § 16-93-402

Where a defendant is placed on probation or where imposition of sentence is suspended, his probation or suspension may be revoked pursuant to a hearing held after expiration of the term of probation or suspension for an act committed prior to the expiration of the term, so long as he is arrested or a warrant is issued for his arrest before expiration of the period of suspension or probation. Ark. Code Ann. § 5-4-309(e) (1987). Where the trial court originally imposes a sentence and suspends execution, however, upon revocation under § 16-93-402(e)(5) the probationer may apparently be sentenced to serve only the balance of the term imposed and suspended. In *Gautreaux v. State*, 22 Ark. App. 130, 736 S.W.2d 23 (1987) the court held that since appellant's probated sentence had expired, she could not be ordered to serve an additional term of imprisonment even though the act on which revocation was based occurred prior to the expiration of the probationary period. See, also, *Easley v. State*, 274 Ark. 215, 623 S.W.2d 189 (1981), relied upon in *Gautreaux*. This is a curious reading of the statute, which says, "the court may revoke the probation and require [the defendant] to serve the sentence imposed or any lesser sentence which might have been originally imposed." Ark. Code Ann. § 16-93-402(e)(5) [Ark. Stat. Ann. § 43-2332 (Supp. 1985)]. Both *Easley* and *Gautreaux* read this language to mean that a proba-

tioner may only be required "to serve the remainder of the sentence imposed," *Easley* at 216, 623 S.W.2d at 190. But see, *Williams v. State*, 280 Ark. 543, 659 S.W.2d 948 (1983) (no sentence imposed when defendant placed on probation for three years, so, upon revocation, a ten year sentence was proper).

Court Lacks Jurisdiction to Suspend Sentence After Execution Begun

In a case removed from the Court of Appeals after certification as involving an issue of significant public importance, the Arkansas Supreme Court has disapproved of "furloughs." *Davis v. State*, 291 Ark. 191, 723 S.W.2d 366 (1987). Appellant was convicted of criminal trespass under § 41-2004 [§ 5-39-203] and sentenced to sixty days in jail by the trial court. After serving eight days of the sentence, she was "admonished to good behavior" and released from jail. *Davis* at 192, 723 S.W.2d at 367. Several months later a motion was filed to revoke appellant's suspended sentence, and the trial court revoked appellant's "furlough" and directed that she serve the balance of her sentence. The Arkansas Supreme Court held that the circuit court had no authority to grant the original "furlough" or to suspend a valid sentence once execution had begun. The Court also interpreted *Coones v. State*, 280 Ark. 321, 657 S.W.2d 553 (1983) to adopt a rule that a trial court lacks jurisdiction to enter any order subsequent to its original sentence. Since the original sentence in the case at bar remained in force, the order returning appellant to jail was upheld. Justices Holt, Hickman, and Purtle dissented, opining that the trial judge had no jurisdiction to alter the sentence and that it had expired on its face.

Revocation Only by Court Imposing Probation

Only the court that places a defendant on probation may revoke probation. *Gill v. State*, 290 Ark. 1, 716 S.W.2d 746 (1986), interpreting §§ 5-4-309(c) and 5-4-309(a)-(b); § 16-93-608(e).

Arrest Tolling Limitations

Section 5-4-309 permits revocation of a suspension or probation after the expiration of the suspension or probation period if the defendant is arrested for violation of suspension or probation before the expira-

tion of this period. Where a defendant is sentenced to serve a ten year sentence with five years suspended, serves time, and is subsequently paroled, the period of suspension within which revocation is permitted begins on the date of parole. *Vann v. State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985), relying upon *Matthews v. State*, 265 Ark. 298, 578 S.W.2d 30 (1979). Vann was arrested before five years had elapsed since the date of his parole, but his suspension was not revoked until after the five year period had run. The Court of Appeals agreed that § 5-4-309(e) permitted tolling of the five year period by proof of an arrest for a suspension or probation violation. It concluded, however, that since the record was silent on the question whether appellant was arrested for a probation violation (as opposed to another offense) before the five year period had run, he was entitled to dismissal of the revocation petition.

Suspension vs. Probation

In *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987), on appeal from revocation of a suspended sentence, appellant argued that the trial court had originally placed him on probation and suspended his sentence. Relying upon *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980), appellant contended that the original sentence was illegal and revocation impermissible. The court did not find it necessary to come to grips with the legality of suspension followed by probation. Instead, it found that claimant had been put on probation in November as a result of misbehavior (drunkenness) several months after suspension of imposition of sentence in August when he entered his guilty plea. The November probation, not the August suspension, was revoked. It is noteworthy that the Court of Appeals did not speak to the effect of concurrent suspension and probation. Though it would appear difficult to justify overturning a sentence on grounds urged in *Ross*, it is undeniably the case that § 5-4-101(1) defines "suspension" as being "without supervision," while § 5-4-101(2) defines "probation" in terms of "supervision of a probation officer." Imposition of one excludes the other.

Revocation of Probation Imposed Under § 5-4-104: Permissible Sentence

It is now clear that upon revocation of

probation imposed under § 5-4-104 the trial court may sentence the defendant to any term it might have originally imposed (see § 5-4-309(f)), such revocations not being governed by § 16-93-402(e)(5), providing that the court "may revoke the probation and require [the defendant] to serve the sentence imposed or any lesser sentence which might have been originally imposed." The Arkansas Supreme Court has held that there is no "sentence imposed" when a defendant is placed on probation. *Williams v. State*, 280 Ark. 543, 659 S.W.2d 948 (1983) (interpreting § 41-801(2) [§ 5-4-101(2)]). Compare, *Easley v. State*, 274 Ark. 215, 623 S.W.2d 189 (1981).

The Arkansas Court of Appeals has explicitly upheld the § 5-4-309(f) procedure permitting imposition of any sentence that could have originally been imposed upon revocation of suspension. *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986).

Under § 5-4-309(f) a court revoking a suspension or probation may "impose any sentence on defendant that might have been imposed originally for the offense for which he was found guilty." But under § 16-93-402(e)(5), a court "may revoke the probation and require (defendant) to serve the sentence imposed or any lesser sentence which might have been originally imposed." It therefore appears that the statute relied upon in a revocation proceeding may have substantial impact on the discretion of the trial court to impose a sentence of imprisonment upon revocation. Moreover, the cases conflict on the issue of a probationer's exposure upon revocation. Compare *Queen v. State*, 271 Ark. 929, 612 S.W.2d 95 (1981) with *Williams v. State*, *supra*.

As indicated in the supplementary commentary to § 5-4-104, it is arguable that by re-enacting § 5-4-104(a) via Act 487 of 1987 the General Assembly repealed by implication conflicting provisions in § 16-90-115, permitting suspension of execution of sentence. To the extent trial courts cease suspending execution of sentences, application of § 16-93-402(e)(5) will diminish (since sentences will no longer be imposed before suspension), and § 5-4-309(f) proceedings will become the rule. Where the trial court erroneously suspends execution and thereby misleads a

defendant about the effect of probation. The *Culpepper* rule will limit the sentence on revocation to the sentence originally imposed.

Revocation of Probation After Fine Imposed and Paid

Although a fine is a "sentence" under § 5-4-104, payment of the fine does not constitute "serving the sentence imposed" under § 16-93-402(e)(5). Probation imposed simultaneously with the fine can be

revoked. A defendant who is fined and placed on probation is subject to probation revocation for violation of conditions of probation. *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986).

Whether a fine constitutes a "sentence imposed" is a question that does not arise in a revocation proceeding under § 5-4-309, since no sentence is ever imposed under the Code approach. §§ 5-4-101, 104.

Original Commentary to § 5-4-310

The procedures set out in this section are designed to comply with the United States Supreme Court decision in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), extending to probation revocation proceedings the same due process requirements that had earlier been applied to parole revocation proceedings by *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Those requirements include the right to a preliminary and a final revocation hearing.

At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:

(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking (probation or) parole. *Gagnon v.*

Scarpelli, 411 U.S. at 786, 93 S. Ct. at 1761, 1762, 36 L. Ed. 2d at 664, quoting from *Morrissey*, *supra*, at 487, 489, 92 S. Ct. at 2603, 2604, 33 L. Ed. 2d at 484.

As can readily be seen, the procedures set out in § 5-4-310 are drawn almost verbatim from the Supreme Court opinion. The Code formulation departs from *Gagnon* only insofar as it recognizes the right to be represented by counsel at the final revocation hearing. (Note, however, that it does not expressly provide for appointed counsel.) The Court in *Gagnon* declined to hold that an indigent defendant is always entitled to appointed counsel at the final revocation hearing, leaving this issue for case-by-case resolution. See, 411 U.S. at 787-790, 93 S. Ct. at 1762, 1763, 36 L. Ed. 2d at 664-666. However, an Arkansas Supreme Court decision recommends, if not mandates, the appointment of counsel for indigent defendants at revocation hearings. See, *Hawkins v. State*, 251 Ark. 955, 475 S.W. 2d 887 (1972). Moreover, an indigent defendant is entitled to appointed counsel if sentencing is to follow revocation, *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); and as explained in the *Commentary* to § 5-4-309(f), the procedure established by the Code calls for a sentencing determination to be made only after the court has decided to revoke a suspension or probation.

The rationale for requiring a preliminary hearing was elucidated in *Morrissey* where the court pointed out that an arrest for violation of parole (suspension or probation) might occur at a time and location far removed from the time and place where an ultimate decision is made as to revocation. "Given these factors, due process would seem to require that some

minimal inquiry be conducted at or reasonably near the place of the alleged parole [suspension or probation] violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. . . . Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is cause or reasonable ground to believe that the arrested [person] has committed acts that would constitute a violation of parole [suspension or probation] conditions." 408 U.S. at 485, 92 S. Ct. at 2602, 33 L. Ed. 2d at 496, 497. Since these factors are not present in every case, § 5-4-310(d) describes several situations in which a preliminary hearing is unnecessary. Clearly, the right to a preliminary hearing can be waived and subsection (d)(1) so provides. If the revocation is based on commission of a subsequent offense, then conviction in an inde-

pendent proceeding should constitute a sufficient determination of probable cause pending a final revocation hearing. See subsection (d)(2). Finally, subsection (d)(3) recognizes that it will frequently be possible to hold the final revocation hearing promptly after arrest and reasonably near the place of arrest or violation. In these circumstances, a preliminary hearing is redundant.

Section 5-4-310(a)(1) provides one additional exception to the general requirement that a defendant subject to suspension or probation must be afforded a preliminary hearing prior to revocation. If the defendant is summoned to appear before the court pursuant to § 5-4-309(a) rather than arrested, then no preliminary hearing should be necessary since the defendant is at liberty pending the final revocation hearing.

1988 Supplementary Commentary to § 5-4-310

Requirement that Revocation Hearing Be Held Within 60 Days

The Supreme Court has consistently held that the 60 day period within which a revocation hearing must be held does not begin to run until the defendant is arrested for a violation of the terms of his suspension or probation. *Lark v. State*, 276 Ark. 411, 637 S.W.2d 529 (Ct. App. 1982); *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980); *Walker v. State*, 262 Ark. 215, 555 S.W.2d 228 (1977); *Blake v. State*, 262 Ark. 301, 556 S.W.2d 427 (1977); *Lincoln v. State*, 262 Ark. 511, 558 S.W.2d 146 (1977). An arrest on other charges does not start the running of the 60 day period, nor does the issuance of an arrest warrant while the defendant is in custody on other charges. In *Boone v. State*, *supra*, the court rejected the argument that a defendant already in custody on other charges was under "constructive arrest" for violation of terms of suspension from the date an arrest warrant was issued on a petition for revocation of suspension.

The prosecution may not have unrestricted discretion to delay filing a petition to revoke suspension or probation. For example, if a defendant commits an act that violates the terms of two separate suspensions or probations, the prosecu-

tion may not be able to cumulate the 60 day periods provided in subsection (b)(2) by filing to revoke one suspension and then filing to revoke the second shortly before the hearing on the first. In *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (Ct. App. 1980) the court questioned but found it unnecessary to rule on the propriety of this stratagem.

The 60 day time period provided in subsection (b)(2) is not jurisdictional. The defendant who fails to object to a delay beyond the 60 day period cannot raise the issue for the first time on appeal. *Haskins v. State*, 264 Ark. 454, 572 S.W.2d 411 (1978). Although there is no express provision for tolling the 60 day period, the Court of Appeals has held, based on the speedy trial rule (Rule 28 of the Arkansas Rules of Criminal Procedure), that the period is tolled during any delay resulting from the defendant's request for an examination and hearing on his competency to stand trial. *Lark v. State*, *supra*; *Cheshire v. State*, 16 Ark. App. 34, 696 S.W.2d 322 (1985).

Waiver of 60 Day Requirement

The Court of Appeals has held that failure to hold a revocation hearing within 60 days of an arrest does not constitute error where the revocation was based upon appellant's robbery conviction.

Phillips v. State, 17 Ark. App. 86, 703 S.W.2d 471 (1986). In November 1983, appellant was charged with violating the terms of his suspended sentences by committing a robbery in October 1983. In July 1984, when he appeared to enter a plea to the robbery charge, his attorney entered not guilty pleas to all charges and waived the 60 day requirement. Appellant was convicted of robbery, and his probation was revoked. On appeal, appellant argued that he did not *personally* waive the 60 day requirement and that because the statute embodies a constitutional right a personal waiver was necessary. Without such a waiver, he contended, the revocation hearing violated constitutional due process requirements. The court disagreed and adopted the State's argument that "as long as the defendant is afforded a hearing and has a reasonable time to prepare, there is no violation of his right to due process." 17 Ark. App. at 92, 703 S.W.2d at 474. Adverting to the rule that an arrest on other charges does not start the running of the 60 day period, nor does the issuance of a revocation arrest warrant while the defendant is in custody on other charges, *Boone v. State*, *supra*, the court found that appellant's incarceration on the robbery charge prior to the revocation hearing did not start the running of the 60 day period. The notice requirement of § 5-4-310(b)(3) does codify a constitutional prerequisite. *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985).

No Requirement of Judgment Within 60 Days

Though a hearing must be held within sixty days of the date of arrest under § 5-4-310(b)(2), the court does not have to render judgment within sixty days. *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

Defendant Required to Give Notice of 60 Day Defense Under § 5-4-310(b)(2)

The statute does not require that a defendant give notice of a "60 day defense." Nonetheless, the Arkansas Supreme Court has held that a defendant waives his right to raise the issue by waiting until the end of a revocation hearing to move to dismiss the petition because the hearing was not held within sixty days of the date of the arrest as required by § 5-4-310(b)(2). *Summers v.*

State, 292 Ark. 237, 729 S.W.2d 147 (1987). The State was not placed on notice before the hearing that appellant would raise this issue. The Court observed that "there was no good reason given why the motion was not filed before the hearing." 292 Ark. at 239, 729 S.W.2d at 148. The Court went on to hold that the State was prejudiced by lack of notice.

Justices Purtle and Newbern dissented in an opinion by Justice Purtle pointing out that there is no precedent for holding that a defendant waives prompt hearing rights under a revocation statute by failing to move for dismissal before the hearing.

Evidence Admissible at a Revocation Hearing

Subsection (c)(2) permits the introduction of any relevant evidence at a revocation hearing, regardless of its admissibility at a criminal trial. This language has been interpreted broadly to permit the introduction of evidence that might be subject to a motion to suppress in a criminal trial as the product of an illegal search, at least where there has been a good faith effort by the police to comply with the law. *Dabney v. State*, 278 Ark. 375, 646 S.W.2d 4 (1983); *Harris v. State*, 270 Ark. 634, 606 S.W.2d 93 (Ct. App. 1980); *Carson v. State*, 21 Ark. App. 249, 731 S.W.2d 237 (1987) (trial court revoking probation found that the exclusionary rule did not apply to revocation proceedings and that evidence obtained by execution of search warrant in question was not excludable since officers had acted in "good faith" reliance upon the facial validity of the warrant). A similar result has been reached as to the statement of an accomplice. *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983).

Burden of Proof and Standard of Appellate Review

In a proceeding to revoke a suspension or probation, the burden is on the State to show by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation. § 5-4-309(d); *Harris v. State*, *supra*; *Ellerson v. State*, 261 Ark. 525, 549 S.W.2d 495 (1977). Prior to 1977 the defendant who appealed the revocation of a suspension or probation was required to demonstrate that the trial

court had abused its discretion. In *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977), this standard was replaced by a clear preponderance of the evidence test. See also, *Adams v. State*, 269 Ark. 601, 599 S.W.2d 437 (Ct. App. 1980); *Thornton v. State*, 267 Ark. 675, 590 S.W.2d 57 (Ct. App. 1979); *Cureton v. State*, 266 Ark. 1034, 589 S.W.2d 204 (Ct. App. 1979).

Revocation Before Criminal Conviction

Section 5-4-303(a) requires the court to provide as an express condition of every suspension or probation that the defendant not commit any subsequent offenses during the period of suspension or probation. Although the Supreme Court expressed its agreement in dictum in a pre-code case with the proposition that a revocation proceeding based solely on another crime "ordinarily" should not be initiated prior to the disposition of that charge, *Hawkins v. State*, 251 Ark. 955, 475 S.W.2d 887 (1972), it has since held that revocation before conviction is not prohibited "in all circumstances." *Ellerson v. State*, *supra*. The fact that the rules on admissibility of evidence are more relaxed and the burden of proof is less strict may make a revocation proceeding more attractive to the prosecution than a criminal trial. If the revocation proceeding is delayed pending completion of the criminal trial and a conviction results, the prosecution is not required to delay the revocation proceeding further while an appeal is taken from the conviction. If, however, the conviction is overturned on appeal, the defendant may be entitled to post-conviction relief on the revocation of suspension or probation. See *Rutledge v. State*, *supra*.

Waiver

Most, and perhaps all, of the requirements imposed by this section are waived in the absence of a timely objection by the defendant:

1. Adequate notice of time and place of revocation hearing. *Rutledge v. State*, *supra*.
2. Form and content of notice of revocation hearing. *Ellerson v. State*, *supra*.
3. Revocation hearing within 60 days of arrest. *Haskins v. State*, 264 Ark. 454, 572 S.W.2d 411 (1978).
4. Written statement of reasons for revocation. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *Hawkins v. State*,

270 Ark. 1016, 607 S.W.2d 400 (Ct. App. 1980).

Preliminary Hearing Requirement

Where, shortly after appellant is charged with attempted theft, a probable cause hearing on the criminal attempt charge is held, the § 5-4-310(a)(1) preliminary hearing requirement is satisfied, and revocation after a proper hearing and within sixty days of the date of arrest will not be overturned for want of a preliminary hearing. *Dunavin v. State*, 18 Ark. App. 178, 712 S.W.2d 326 (1986). The Court was careful to point out, however, that not all probable cause hearings would satisfy the § 5-4-310 preliminary hearing requirement, but it did not go further to state the precise circumstances under which a violation of § 5-4-310 would be found.

Right to Counsel in Revocation Proceeding

A defendant has a constitutional and statutory right to counsel at a revocation hearing. *Furr v. State*, 285 Ark. 45, 685 S.W.2d 149 (1985), citing *Mempa v. Rhay*, 389 U.S. 128, 19 L. Ed. 2d 336 (1967) (counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected). In *Suire v. State*, 18 Ark. App. 166, 712 S.W.2d 317 (1986), appellant appealed the revocation of his probation at a hearing at which the trial court compelled him to represent himself. Appellant's motion that the trial court appoint counsel was denied on grounds that appellant was not indigent. The court advised him to retain an attorney. After several continuances, appellant appeared with counsel, but the attorney asked to be relieved on grounds that appellant had paid only part of the fee agreed upon. Appellant conceded that this was the case. The trial court granted counsel's motion to be relieved, put appellant to a revocation hearing, and revoked his probation, sentencing him to six years' imprisonment. On appeal, appellant argued that he did not knowingly and intelligently waive his right to counsel. The Court of Appeals agreed, relying on the following standard enunciated by the Arkansas Supreme Court in *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986):

When an accused appears with retained counsel, the trial judge should

not allow the attorney of record to withdraw until:

- (1) New counsel has been retained; or
- (2) A showing of indigency has been made and counsel has been appointed; or
- (3) A voluntary and intelligent waiver of right to counsel is established on the record.

To establish the latter, the trial judge must explain to the accused that he is entitled as a matter of law to an attorney and question him to see if he can afford counsel. The judge must also explain the desirability of having

the assistance of an attorney during the trial and the problems attendant to one representing himself. This last requirement is especially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and receives no special consideration on appeal.

Id. at 248, 704 S.W.2d at 613.

In regard to voluntary and intelligent waivers, compare *Suire v. State* (no waiver) with *Murdock v. State*, 18 Ark. App. 228, 712 S.W.2d 321 (1986) (waiver found).

Original Commentary to § 5-4-311

Subsection (a), which complements § 5-4-301(d), is designed to fully effectuate the Commission's view that an offender who successfully completes a period of suspension or probation should have an unblemished record. Its language is drawn from the Controlled Substances Act, Ark. Stat. Ann. § 82-2623 (Supp. 1973) [§ 5-64-407] ("Upon fulfillment of the term and conditions, the court shall discharge the person and dismiss the proceedings against him"). If a judgment of conviction was originally entered because the court chose one of the sentencing alternatives described in § 5-4-301(d)(1) or (2), then this section is not applicable and the defendant has been "convicted" of an offense.

Subsection (b) sets out in more detail the effect of a discharge and dismissal

pursuant to this section. The subsection appears as originally enacted except for the introductory phrase added by Act 474 of 1977 to permit a finding of guilt to be proved in a hearing under § 5-4-501. Otherwise, the first sentence is derived from § 82-2623 [§ 5-64-407]. The second sentence is patterned after similar provisions in the proposed criminal codes of Michigan and Kansas. Proposed Michigan Code § 1340(7) (1967); Proposed Kansas Code § 21-1615 (1968). Similar provisions appear as § 3 of Act 346 of 1975 and § 7 of Act 378 of 1975.

Note that even though a person may deny a *conviction* under the second sentence, he may not deny a *finding of guilt* in a § 5-4-501 proceeding.

1988 Supplementary Commentary to § 5-4-311

This section was designed to give the defendant who successfully completes a period of suspension or probation a clean record. The operative effect of the section is now qualified as a result of Act 474 of 1977, which amended § 5-4-501 to provide that a defendant can be punished as a habitual offender based on a prior find-

ing of guilt of a felony as well as conviction of a felony. As explained in the supplementary commentary to § 5-4-501, the purpose of the change was to expose a defendant who receives a suspended sentence or probation to punishment as a habitual offender if he is convicted of a subsequent felony.

1988 Supplementary Commentary to § 5-4-320

Section 5-4-320 is new, having been added by Act 548 of 1985. The section merely provides that, after entering an order suspending imposition of a sentence of imprisonment or an order placing a

defendant on probation, a court may order the defendant to observe the operation of a Department of Correction facility. The court may also, of course, sentence a defendant in these circumstances to serve

periods of confinement in a facility authorized by § 5-4-304. See, also, commentary to § 5-4-304.

Original Commentary to § 5-4-401

The traditional practice of setting out a penal provision in the statute defining an offense has resulted in almost as many imprisonment ranges as there are offenses. In an effort to achieve greater consistency in the punishment of comparable criminal conduct, the Code adopts the approach recommended by the Model Penal Code and the ABA Project on Minimum Standards for Criminal Justice — i.e., creation of a limited number of sentencing categories and assignment of each offense to a category. In arriving at the sentencing ranges set out in § 5-4-401, the Commission proceeded on the theory that the legislature should indicate only in a general way the severity of a particular offense and allow more refined judgments as to appropriate punishment to be made by the jury or court based on the circumstances of each individual case. Therefore, the only necessary inquiry at this point is whether the imprisonment alternatives set out in this section provide the legislature engaged in categorizing offenses with a sufficient array of penal sanctions and whether the sentencing range within each category is large enough to leave suitable discretion to the court.

ORIGINAL CODE (1975)

Subsection (a) prescribed imprisonment ranges for the four categories of felonies created by the Code. As under present law, the sentence within the range actually received by the felon represents the maximum period he may be held by the Department of Corrections. The Code makes no changes in parole procedures; the actual time of release from imprisonment will be determined by the Board of Pardons and Paroles pursuant to the regulations presently codified in Ark. Stat. Ann. §§ 43-2801 et seq. (Supp. 1975). Subsection (a) originally authorized a maximum term of 50 years upon conviction of a class

A felony, when the jury or court decided not to impose a life sentence. Since 50 years approximated, in the Commission's judgment, the average life expectancy of a young felon, the limitation prevented a sentence to a term of years that exceeded as a practical matter a life sentence. Under former subsection (1) (f), all unpealed felonies outside the Code continued to carry the same penalties as before enactment of the Code. Subsection (1)(f) was designed to apply if a future legislature, either intentionally or accidentally, enacted a felony statute that includes its own penal provision.

Act 474 of 1977 amended § 5-4-401 to increase the possible minimum and maximum terms of imprisonment for class C felonies and to increase the maximum possible term of imprisonment for class D felonies. Under the Code as originally enacted one could be sentenced to imprisonment of not less than 1 year nor more than 5 years for a class C felony, or for up to 3 years as a result of a conviction of a class D felony. The imprisonment ranges for class A and B felonies and for misdemeanors were not affected by Act 474.

Subsections (b)(1), (2) and (3) reflect the most common maximum terms for misdemeanors under present law. Subsection (b)(4) serves the same function with respect to misdemeanors as does (a)(6) in the case of felonies. Since misdemeanors outside the Code are too numerous to reclassify into Code categories, subsection (b)(4) also ensures that their penal provisions will continue to govern sentences to imprisonment. It should be noted again that an offense is a misdemeanor for purposes of the Code only if a sentence to imprisonment is authorized upon conviction. Therefore, regardless of the designation appearing in the defining statute, an offense punishable by fine only is a violation for purposes of the Code and § 5-4-401 is inapplicable.

1988 Supplementary Commentary to § 5-4-401

Reclassification of Felonies

As explained in the Commentary to § 5-4-104, the 1981 General Assembly created a new class of felony, called Class Y, and reclassified the following felonies from Class A to Class Y: murder in the first degree (§ 5-10-102), kidnapping (§ 5-11-102), rape (§ 5-14-103), and aggravated robbery (§ 5-12-103). The same Act provided for a minimum term of imprisonment upon conviction of a Class Y felony that is greater than the minimum term for a Class A felony under the original Code.

At the same time, the maximum term of imprisonment upon conviction of a Class A felony was reduced in recognition of the fact that the more serious Class A felonies had now been reclassified as Class Y offenses. The minimum term imposed upon conviction of a Class B or Class C felony was increased, while the maximum term that could be imposed upon conviction of a Class D felony was increased. The following chart details the effect of this revision of sentencing ranges:

<i>Felony Class</i>	<i>Original Code</i>	<i>Revised Code</i>
Y	No such class	10 to 40 years or life
A	5 to 50 years or life	6 to 30 years
B	3 to 20 years	5 to 20 years
C	2 to 10 years	3* to 10 years
D	Up to 5 years	Up to 6 years

*The 1981 Act increased the minimum term of imprisonment for Class C felonies from 2 to 4 years. The minimum was lowered to 3 years by Act 409 of 1983.

Since any changes in sentencing ranges are substantive rather than procedural, they are not applied retroactively. Felonies committed prior to the effective date of the 1981 Act (July 1, 1981) and Class C felonies committed prior to the date of the 1983 Act (July 1, 1983) are punishable in accordance with the sentencing ranges in effect at the time the felony was committed. See *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

Power of Appellate Court to Revise Sentence

One question that continues to arise on appeal is the power of an appellate court to revise the sentence imposed by a jury or trial court. At the time the Code was enacted it seemed clear that the powers of an appellate court to reduce the sentence imposed below were extremely limited. In *Osborne v. State*, 237 Ark. 5, 371 S.W.2d 518 (1963) the Supreme Court expressly overruled earlier cases in which it assumed the power to mitigate the punishment imposed by the trial court, stating:

The right to exercise clemency is, however, vested not in the courts but

in the chief executive. Ark. Const. Art. 6, § 18. Our latest cases have uniformly followed the rule, which we think to be sound, that the sentence is to be fixed by the jury rather than by this court. If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we may think it to be unduly harsh.

237 Ark. at 7, 371 S.W.2d at 520.

In a supplemental opinion on rehearing, the court qualified its initial opinion as follows:

When an erroneous ruling has nothing to do with the issue of guilt or innocence and relates only to punishment, it may be corrected by reducing the sentence to the minimum provided by law.

237 Ark. at 172, 371 S.W.2d at 521.

Since in the *Osborne* case the trial court had not properly instructed the jury as to the weight to be given certain prior convictions of the defendant in assessing pun-

ishment, the court ordered the sentence imposed by the jury reduced from 20 to two years, unless the Attorney General requested a remand for a new trial.

When in 1971 the legislature enacted Act 333 (§ 43-2725.2) [§ 16-91-113], which empowered the Supreme Court to reduce a sentence it deemed excessive, the Court salvaged the constitutionality of the act in *Abbott v. State*, 256 Ark. 558, 508 S.W.2d 733 (1974) by adopting a construction consistent with the rule announced in *Osborne*:

In [*People v. Odle*, 37 Ca.2d 52, 230 P.2d 345 (1951)] a similar statute was construed by the California court to do no more than authorize it to reduce punishment, in lieu of granting a new trial, when the only error found on appellate review related to the punishment imposed and was prejudicial. It specifically held that the statute granted no power to modify a sentence where there was no error in the proceeding.

....

We think the construction given to the California statute by that state's Supreme Court was correct and that the same construction should be given our statute. 256 Ark. at 563, 508 S.W.2d at 736.

A few months later the Court again held that it had no power to reduce a sentence within statutory limits in spite of the defendant's assertion that the verdict indicated "passion and prejudice on the part of the jury." *Hooper v. State*, 257 Ark. 103, 514 S.W.2d 394 (1974). Thus, at the time the Code was adopted in 1975, the rule seemed firmly established that an appellate court could reduce a sentence within statutory limits only in the case of prejudicial error related to the sentencing of a defendant.

In 1977 the Supreme Court handed down an opinion in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878 (1977). Collins had originally been sentenced to death and his sentence had been affirmed by the Supreme Court. *Collins v. State*, 259 Ark. 9, 531 S.W.2d 13 (1975). His petition for certiorari was granted by the United States Supreme Court, which then remanded the case to the Arkansas Supreme Court for further consideration in light of *Gregg v. Georgia*,

428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); and *Roberts v. Louisiana*, 428 U.S. 325 (1976). In reconsidering its judgment the Arkansas Supreme Court was constrained to address the United States Supreme Court's concern regarding the existence of an adequate power in the judiciary to check the arbitrary and capricious exercise of the power of the jury to impose the death penalty. The Arkansas court concluded in *Collins* that: "The Arkansas judiciary is vested with broad powers to check the arbitrary, capricious, wanton or freakish imposition of the death penalty. These powers exist at both trial and appellate levels." 261 Ark. at 206, 548 S.W.2d at 112.

In reaching this conclusion, it was necessary for the Court to distinguish the rule adopted in such cases as *Osborne* and *Hooper*, which severely restricted appellate review of sentences. It offered several grounds for distinguishing cases where a reduction of sentence is a proper matter for judicial review from those where reduction of sentence would amount to clemency:

There is a vast difference in reviewing a sentence for error (including error resulting from insufficient evidentiary support) in the sentencing procedure where sufficiency of evidence is not a basis for review. There is also a great difference in reducing a sentence when there is error in fixing the degree of the crime and reducing a sentence when there is not. The former has nothing to do with clemency.

There is also a difference where nature of punishment rather than the duration is at issue. (Citations omitted) We long ago recognized that the constitutional ban of cruel and unusual punishment is directed against the character of the punishment and not its duration. (Citations omitted)

261 Ark. at 213, 548 S.W.2d at 117.

The Court then went on to discuss a number of cases, many involving the death penalty, in which the Court had modified a sentence on appeal. It concluded its review by stating:

Unquestionably this court has the right, power and duty to reduce the

punishment in any case where there is any indication that it resulted from passion and prejudice. *Hadley v. State*, 196 Ark. 307, 117 S.W.2d 352; *Wilkerson v. State*, 209 Ark. 138, 189 S.W.2d 800. We have done it by reducing a sentence of death on a rape to life imprisonment. *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931. We also carefully reviewed evidence to determine whether there was an abuse by the trial court or jury in fixing a punishment within statutory limits. *Wilkerson v. State*, *supra*; *Rutledge v. State*.

261 Ark. at 217, 548 S.W.2d at 118.

The reference to *Hogan* is unobjectionable since the prosecutor in that case had stated within hearing of the jury that the defendant had offered to plead guilty to escape the death penalty. The Supreme Court cured the error by accepting a plea of guilty and reducing the sentence to life imprisonment. But *Hadley* and *Wilkerson* both involved cases in which the court assumed the power in noncapital cases to reduce sentences that were within statutory limits, a practice that was clearly overruled by *Osborne* and *Hooper*. By invoking these early decisions to support its contention that appellate courts have the power to reduce punishment where there is any indication that it resulted from passion and prejudice, the Court called into question the continued validity of the rule announced in *Osborne* and *Hooper*.

In *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978), decided shortly after *Collins*, the Supreme Court did not acknowledge that it may have substantially eroded the rule of *Osborne*:

Appellant also relies upon such cases as *Carson v. State*, 206 Ark. 80, 173 S.W.2d 122, which are contrary to our decision in *Osborne v. State*, (citations omitted), and for that reason not authoritative. We have made it quite clear that we are not empowered to reduce a sentence within statutory limits in the absence of error in the proceeding simply because we might think the sentence to be excessive. See *Abbott v. State*, *supra*. Not only would doing so be an act of clemency, it would be a substitution of the judgment of a group of appellate judges who had not seen or heard the parties and witnesses for the judgment of a jury and trial judge who had. This is not to say that we have no power to

reduce the punishment where we can say that it resulted from passion or prejudice or was a clear abuse of the jury's discretion. *Collins v. State*, (citations omitted). We are unable to say that this is such a case. (Emphasis added)

263 Ark. at 362, 565 S.W.2d at 27.

Stout holds that an appellate court cannot reduce a sentence it thinks is excessive but it can reduce a sentence it thinks resulted from passion or prejudice or was a clear abuse of the jury's discretion. It may be possible to distinguish a sentence that is merely excessive from one affected by passion or prejudice. Presumably the defendant must show that the jury was influenced by improper factors such as a racial prejudice, public opinion, or inadmissible evidence before a reduction of sentence is appropriate. But the distinction between a sentence that is merely excessive and one that is a clear abuse of the jury's discretion is unclear.

The cases decided since *Stout* suggest that the broad appellate review discussed in *Collins* may be limited to capital cases. In *Kaestel v. State*, 274 Ark. 550, 626 S.W.2d 940 (1982), the court stated: "As to the severity of the sentence, except in capital cases we do not review the severity of a sentence within the lawful maximum limit and not affected by error in the trial, that determination having been committed to the jury by the Constitution and statutes. *Osborne v. State*, (citations omitted)." The other non-capital cases decided since *Collins* have adhered to the *Osborne* rule. *Lear v. State*, 278 Ark. 70, 643 S.W.2d 550 (1982); *Jennings v. State*, 268 Ark. 216, 594 S.W.2d 855 (1980); *Hunter v. State*, 264 Ark. 195, 570 S.W.2d 267 (1978). One non-capital case in which the appellate court did reduce a sentence in *Philmon v. State*, 267 Ark. 1121, 593 S.W.2d 504 (Ct. App. 1980), but that case involved the admission into evidence of testimony that may have improperly influenced the jury in its decision on punishment.

Cases decided after *Collins* involving appellate review of death sentences are discussed in the supplementary commentary to § 5-4-602.

See AMCI 5001-06.

Class Y Reclassifications Substantive

Reclassification of rape as a class Y

felony was held in *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985) to be a substantive change. A defendant charged with an offense after the effective date of the reclassification amendment must be tried under substantive law in effect when the offense was committed. Though the court made no broad finding applicable to past and future reclassifications, the assumption that *Young* will govern is obviously advisable. See also *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

Class Y Felonies: Suspension or Probation

In *Campbell v. State*, 288 Ark. 213, 703 S.W.2d 855 (1986) appellant was sentenced to 50 years' imprisonment with 15 years suspended after pleading guilty to a rape charge. Subsequently, he filed a Rule 37 petition alleging that the sentence was illegal. The Court agreed, finding that a

class Y felony carries a term of imprisonment of 10 to 40 years or life. The Court upheld imposition of a 35 year sentence and the lower court's refusal to apply the 15 year suspension to the 35 year sentence to reduce it to 20 years. In so holding, the Supreme Court commented, "There is another reason why the modification [from 50 to 35 years] was not erroneous — the suspension of a part of the class Y felony sentence is prohibited under Ark. Stat. Ann. § 41-803(5) [§ 5-4-104(e)]" *Id.* at 217, 703 S.W.2d at 858. The Court may have ruled out a sentence to imprisonment of permissible length followed by suspension of imposition of sentence to an additional term — e.g., 20 years to serve followed by suspension for 20 years — an option that is available for non-class Y offenses.

Original Commentary to § 5-4-402

This section preserves the traditional distinction, with respect to place of imprisonment, between felonies and misdemeanors. The section is necessary since,

as explained in the Commentary to § 5-1-106, the penal provision of felonies will no longer contain the language "imprisonment in the penitentiary."

1988 Supplementary Commentary to § 5-4-402

Act 982 of 1985 added subsection (3). By requiring imprisonment in the Department of Correction following conviction under § 5-64-401 the section removes any doubt that § 82-2617 defines a felony. Enactment of subsection (3) was evidently thought advisable in view of a lower court ruling that a previous version of § 5-64-401(a)(1)(iv) defined a misdemeanor because it neither stated that its violation was a felony nor required imprisonment in the penitentiary. *Dollar v. State*, 287

Ark. 61, 697 S.W.2d 868 (1985). See, also, *Bennett v. State*, 252 Ark. 128, 477 S.W.2d 129 (1972), a pre-code decision holding that a statute not requiring imprisonment in the state penitentiary defines a misdemeanor. See also Section 3 of Act 165 of 1985; *Johnson v. State*, 285 Ark. 347, 684 S.W.2d 443 (1985); *Osgood v. State*, 285 Ark. 348, 686 S.W.2d 442 (1985); *Harrod v. State*, 286 Ark. 277, 691 S.W.2d 172 (1985).

Original Commentary to § 5-4-403

Section 5-4-403(a) is addressed to a court that is imposing multiple sentences following convictions of several different offenses. By providing that such sentences run concurrently unless the judgment directs otherwise, it restates former law. See preexisting authority at Ark. Stat. Ann. §§ 43-2311 (Repl. 1964); 43-2312 (Supp. 1973) as interpreted in *Williams v. State*, 229 Ark. 42, 313 S.W.2d 242 (1958).

Subsection (b) is addressed to the situ-

ation where an Arkansas court is imposing sentence on a defendant who is already under sentence by another court, either of this state or another jurisdiction. Again, if the record is silent, the sentences run concurrently. In *Young v. State*, 252 Ark. 184, 477 S.W.2d 823 (1972), the Supreme Court approved the rule that sentences imposed by different sovereigns run consecutively, when the second court fails to provide otherwise. However, an

amendment to Ark. Stat. Ann. § 43-2312 (Supp. 1973), passed after the commitment in *Young* but before that case was decided, extended the application of that statute to previous convictions "regardless if all the convictions are in the same court, or if one of the convictions is in a different court of the state, a court of another state or a federal court." See, Act 193 of 1971, § 1. Since *Williams v. State, supra*, interpreted § 43-2312 to require concurrent sentences unless otherwise stated, it would appear that this rule previously applied even if the sentences were imposed by different sovereigns. If so, § 5-4-403(b) does not change prior law.

Subsection (c) prescribes outer limits on the power of a court to direct that sentences run consecutively. Since only the

Department of Corrections is equipped to rehabilitate offenders, a person who is both a felon and a misdemeanor should be imprisoned at the state level. It would frustrate the rehabilitative objectives of the state penal system, if subsequent to release from prison, the person could be incarcerated in a county jail under circumstances having no rehabilitative potential. Therefore, subsection (c)(1) states that a sentence to imprisonment for a misdemeanor must run concurrently with any sentence for a felony. Subparagraph (c)(2), setting a limit of one year on aggregate misdemeanor sentences, is justified by the absence of rehabilitative facilities at the local level and the lack of parole procedures for misdemeanants.

1988 Supplementary Commentary to § 5-4-403

Once execution of sentence has begun, the trial court loses jurisdiction to modify the sentence. It cannot thereafter change multiple sentences to run concurrently or consecutively. *Massey v. State*, 278 Ark. 625, 648 S.W.2d 52 (1983).

The Eighth Amendment to the United States Constitution, which prohibits sentences that are disproportionate to the crime committed, may establish outside limits on the ability of the trial court to order that multiple sentences run consecutively.

The criteria used to determine whether a particular sentence is constitutionally disproportionate are discussed in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001 (1983). In *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983), the Arkansas Supreme Court applied the *Solem v. Helm* criteria and upheld a cumulative sentence of 160 years and a \$160,000 fine based on a conviction of 16 separate counts of carnal abuse of the same 12 year old child.

Original Commentary to § 5-4-404

Section 5-4-404 requires that an offender sentenced to imprisonment be given credit for the time spent in custody prior to the commencement of the sentence. The credit also applies to time spent in custody on related charges based on the same conduct for which the offender is ultimately sentenced to imprisonment. For example, if a person is charged with theft but is ultimately convicted of burglary, he must receive credit for the time spent in custody on the theft charge if the two offenses involve the same conduct.

Under older statutory law, crediting jail time against a sentence to imprisonment was discretionary with the trial judge. Ark. Stat. Ann. § 43-2813 (Supp. 1973) [§ 16-93-610]. However, in *Smith v. State*,

256 Ark. 425, 508 S.W.2d 54 (1974), the Supreme Court held that the court must give credit for jail time if the offense charged was bailable and the defendant was unable to post bail due to indigency. A subsequent decision, *Charles v. State*, 256 Ark. 690, 510 S.W.2d 68 (1974), placed the burden of showing indigency on defendant.

The Commission felt that in the vast majority of cases, failure to make bond is attributable to the defendant's lack of funds, and accordingly, has eliminated the necessity of showing indigency.

The section does not except cases where the defendant is charged with a non-bailable offense. Article 2, section 8 of the Arkansas Constitution provides that all offenses are bailable except those punish-

able by death, and capital offenses now include only the most aggravated types of homicide. If the defendant is convicted of a capital offense, requiring credit for jail time will make little difference since the only possible sentences are death or life imprisonment without parole. If a defendant charged with a capital offense is convicted of a non-capital offense, then

the jury's verdict is a strong indication that defendant should have been originally charged with a bailable offense and credit for jail time is appropriate. Hence, requiring credit for jail time in the case of a non-bailable offense tends to achieve a fair and correct result in the only situation in which granting credit is meaningful.

1988 Supplementary Commentary to § 5-4-404

If a defendant receives a suspended sentence, and the sentence is subsequently revoked and a sentence to imprisonment is imposed, the defendant must be

given credit for time spent in custody for the conduct that originally led to the suspended sentence. *Boone v. State*, 270 Ark. 83, 603 S.W.2d 410 (1980).

Original Commentary to § 5-4-501

While adhering to the principle that the habitual offender should be subject to more severe penalties, § 5-4-501 sets out a new method of determining the authorized sentencing range in such cases. Previous law applied a fixed formula to the ordinary sentence range prescribed for the felony. It required adding one year to the minimum sentence on conviction of a second offense, adding three years to the minimum sentence on conviction of a third offense and substituting the maximum for the minimum sentence on conviction of a fourth offense. Unless the minimum sentence exceeded it, the maximum sentence did not change until a fourth conviction, at which time it increased by half. See prior law formerly found at Ark. Stat. Ann. § 43-2328 (Supp.

1973). By adding an absolute number of years to the ordinary sentence in the case of a second or third conviction, the formula ignored substantial differences in the ordinary sentences for offenses. The result was a wide variation in the relative effect of a second or third conviction depending on the particular felony of which defendant was convicted. Although the relative effect of a fourth conviction was the same for all felonies since the same factor was applied to the ordinary maximum sentence, the increase in potential sentence was often greatly exaggerated between the third and fourth conviction of the same offense. Compare, for example, the effect of applying former § 43-2328 to felonies that were punishable by 1 to 5 years and 1 to 20 years, respectively:

Ordinary Sentence	Second Offense	Third Offense	Fourth Offense
1-5 Yrs.	2-5 Yrs.	4-5 Yrs.	5-7 1/2 Yrs.
1-20 Yrs.	2-20 Yrs.	4-20 Yrs.	20-30 Yrs.

The formula produced a fairly constant progression of ranges for the 1 to 5 year sentence, although the court's discretion was somewhat restricted by the narrow sentencing range in the case of a third conviction. The relative effect on a 1 to 20 year sentence in the case of a second and third conviction was negligible, especially in light of the fact that a first conviction

often resulted in a sentence exceeding four years. Moreover, there was a substantial jump in the sentence range upon a fourth conviction of a felony carrying a 1 to 20 year sentence. Section 5-4-501, as amended by Act 474 of 1977, achieves the basic purpose of punishing the recidivist more severely but does so by a simpler, more consistent

method. Both the minimum and the maximum sentences are increased in a progressive fashion — *i.e.*, the increase is greater as the felony becomes more serious. Under the Code as originally enacted extended terms were not authorized unless the defendant had two prior felony convictions. Under Act 474, however, the introductory paragraphs of §§ 5-4-501(a) and (b) ground habitual offender liability on *findings of guilt* as well as on convictions. Accordingly, one who has been found guilty of two prior felonies but who has received probation — *i.e.*, has not been “convicted” — is exposed to punishment as an habitual offender if found guilty of a third felony offense.

Subsection 5-4-501(b) was also added by Act 474. It deals with the incorrigible habitual offender — a person with four or more felony convictions — by subjecting him to progressively increasing imprisonment terms of extraordinary length.

It should also be noted that the increase in ordinary penalties for class C and D felonies has necessitated adjustment of the possible maximum and minimum

terms of imprisonment under §§ 5-4-501(a)(3) and (4), and 5-4-501(b)(3) and (4). In addition, §§ 5-4-501(a)(6) and (7) as well as 5-4-501(b)(6) and (7) permit calculation of extended terms triggered by convictions of unclassified felonies — something the original Code did not allow.

Although prior to the Code’s enactment most circuit judges treated convictions for burglary and grand larceny as a single prior conviction for purposes of habitual offender sentencing, a few apparently considered such a disposition to constitute two convictions. To achieve some parity of treatment in calculating the number of prior convictions, subsection (c) consolidates a burglary and the offense that was its object into a single felony conviction for habitual offender purposes. The subsection also incorporates the “finding of guilt” terminology. The second sentence of subsection (c) ensures that a conviction or finding of guilt under a felony statute repealed or superseded by the Code is still considered a sentencing determinant under this section.

1983 Supplementary Commentary to § 5-4-501

Enhancement by Suspended or Probated Sentence

Act 474 of 1977 amended § 5-4-501 to provide that a defendant can be punished as a habitual offender based on a prior finding of guilt of a felony as well as conviction of a felony. The purpose of this change was to make it clear that a defendant who receives a suspended sentence or probation is exposed to punishment as a habitual offender if he is convicted of a subsequent felony.

The efficacy of the change is in question as a result of the Supreme Court decision in *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1982). As more fully explained in the supplementary commentary to § 5-4-104, there existed prior to the adoption of the Code a procedure called “court probation” pursuant to which a court could defer acceptance of a plea of guilty for a reasonable period of time to give the defendant an opportunity to rehabilitate himself. See *Cantrell v. State*, 258 Ark. 833, 529 S.W.2d 136 (1975) and *Maddox v. State*, 247 Ark. 553, 446 S.W.2d 210 (1969). The procedure was judicially created; it was not codified by statute

prior to the Code. The issue in *English* was whether a “court probation” (apparently entered after the adoption of the Code) was a conviction or finding of guilty for purposes of the sentence enhancement provisions of § 5-4-501. A unanimous Court agreed that it was not since there can be no conviction or finding of guilt until a plea of guilty is finally accepted.

English also held that “court probation” was abolished by the Code. The Court’s opinion states that the Code codified the “court probation” procedure and then concludes that “apart from statute this common law ‘court probation’ procedure is no longer available as a sentencing alternative.” *Id.* at 306, 626 S.W.2d at _____. The effect to be given an attempted “court probation” for habitual offender purposes in the future is not clear. The holding in *English* suggests that when the court does mistakenly attempt to defer acceptance of a plea of guilty, there has not been a prior finding of guilty for purposes of § 5-4-501. In *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983), the defendant entered a plea of guilty and was given a statement that read:

The court has not accepted your plea and instead has placed you on probation with all further proceedings postponed for three years conditioned on your good behavior.

In dictum, the Supreme Court stated: "The trial court, as a matter of law, did accept the plea because the statutory form of probation ended local forms of court probation. *English v. State*, (citations

omitted)." *Id.* at 434, 645 S.W.2d at 957. Although *Hunter* did not involve the interpretation of § 5-4-501, the language used may mean that in the future an attempted "court probation" will be treated as a finding of guilt for purposes of § 5-4-501.

The General Assembly amended the penalty ranges for habitual offenders in 1977, 1981, and 1983.

See AMCI 7001, 7001-A, 7002.

1988 Supplementary Commentary to § 5-4-501

Expunged Convictions

Gosnell v. State, 284 Ark. 299, 681 S.W.2d 385 (1984) holds that an expunged conviction may be used for enhancement purposes under § 5-4-501.

Convictions on Appeal

Appealed convictions are "previous convictions" for the purposes of § 5-4-501. *Hill v. State*, 13 Ark. App. 307, 638 S.W.2d 628 (1985). The *Hill* decision has been followed in *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985). The Supreme Court has refused to distinguish between convictions on direct appeal and those subject to attack under Rule 37, holding that both kinds may be used for enhancement. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987).

Enhancement by Conviction Subsequently Reversed

In *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987), appellant's sentence was enhanced by introduction of evidence of a previous felony conviction on appeal at the time of trial and subsequently reversed and dismissed by the appellate court. The Supreme Court held that the trial court did not commit error by permitting use of the previous conviction and pointed out that appellant could obtain relief under Ark. R. Cr. P. Rule 37.1 if the sentence he received was in fact in excess of the maximum authorized by law.

Where a conviction used to enhance is later reversed, *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987), cert. granted, — U.S. — (1988), may prevent a retrial. See Supplementary Commentary, *infra*.

Grading Provisions Containing "For All Purposes Other Than Disposition" Language

In *Williams v. State*, 292 Ark. 616, 732

S.W.2d 135 (1987), appellant had been convicted below of two counts of delivering a controlled substance in violation of Ark. Stat. Ann. § 82-2617 [§ 5-64-401]. As an habitual offender he received a sentence of sixty years on each count from a jury charged that under Ark. Stat. Ann. § 41-1001 [§ 5-4-501] he could be sentenced to "not less than 20 years nor more than 60 years, or life." 292 Ark. at 617, 732 S.W.2d at 136. Section 5-64-401, the statute defining the drug offense, permits imposition of fines up to \$250,000, something not permitted upon conviction of class Y felonies under § 5-4-201. The penalty provision of § 5-64-401 ends with the statement, "For all purposes other than disposition, this offense is a class Y felony." Appellant argued that this language meant that the drug offenses of which he was convicted were unclassified felonies and that enhancement should have been governed by § 5-4-501(a)(7) permitting a shorter sentence, rather than § 5-4-501(a)(1). The Court disagreed, pointing out that the language reflected another legislative purpose:

Obviously, the General Assembly did not want trial courts to be limited to the dispositions authorized by Ark. Stat. Ann. § 41-901 [§ 5-4-401] for class Y felonies. Rather, the legislative attempt was to take any profit out of selling drugs and to impose longer sentences. It is simply inconceivable that the General Assembly would go to such lengths to devise a harsher scheme of punishment for drug offenders under Ark. Stat. Ann. § 82-2617 [§ 5-64-401] and then turn around and intend for the same offenders to receive more favorable treatment under Ark. Stat. Ann. § 41-1001 [§ 5-4-501], the sentence enhancement statute.

292 Ark. at 618-19, 732 S.W.2d at 136-37.

The "for all purposes other than disposition" language originally appeared in the Code at § 5-10-101 (capital murder) to permit easy grading of inchoate offenses (i.e., one degree below substantive offense) while recognizing that a different disposition procedure was constitutionally required in death penalty cases. The language is obviously confusing in other contexts. With regard to the Statute under scrutiny, § 5-64-401, the Legislature should have provided language to this effect: "For purposes of enhancement under § 5-4-501 *et seq.* this offense is a class Y felony."

Burden of Proof Under Subsection (c)

In *Shockley v. State*, 291 Ark. 251, 724 S.W.2d 156 (1987), petitioner sought relief under Rule 37, claiming that at the 1983 trial where he was convicted of rape, aggravated robbery, burglary and theft of property, his sentence was enhanced by proof of burglary and battery convictions in 1977, counted as separate convictions for enhancement purposes. Claimant contended in the Rule 37 proceeding that "since the state did not prove that in his case the battery was not the object of the burglary, the State had proved only two prior felony convictions," *id.* at 253, 724 S.W.2d at 157, and that his sentence was therefore illegal since, at the time, proof of at least three felonies was required for enhancement. The Supreme Court disagreed, finding,

The battery was based upon the shooting of a policeman who responded to a report that the burglary was in progress. The burglary and battery convictions were entirely separate and not subject to being counted as one offense under the habitual offender statute.

Id. at 253, 724 S.W.2d at 157.

The Court did not, however, directly address the question raised by appellant — namely, who has the burden of going forward on this issue and what is the burden of proof. Proof of a previous conviction must be beyond a reasonable doubt under § 5-4-504. It would seem that the State should carry the same burden on the issue of whether two convictions should be merged under subsection (c), once the defendant has raised the issue. See, also, § 5-1-111(c) (when issue of existence of defense should be submitted to jury).

Specific Allegations About Prior Convictions Required

In *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987) the Arkansas Supreme Court reviewed cases decided since 1980 governing giving defendants notice of the number of previous convictions to be used for enhancement purposes. Prior convictions, like essential elements of an offense, must be specifically alleged in order to be introduced at trial. *Clinkscale v. State*, 269 Ark. 324, 602 S.W.2d 618 (1980). After reviewing *Clinkscale* and *Reed v. State*, 282 Ark. 492, 669 S.W.2d 192 (1984), the Court in *Malone* ruled that "for the purposes of the application of the enhancement statute, we hold that there is no distinction between "two or more" and "more than two," or "four or more" and "more than four." 292 Ark. at 247, 729 S.W.2d at 170.

The Court went on to say,

It would be error to allow the state to prove "four or more" priors when the information charges the defendant with only "two or more" felonies because a more severe range of punishment for the offense is invoked when four or more priors are established. When the state alleges "two or more" prior felonies, the accused is justified in believing that he will not have to face the introduction of "four or more" prior convictions at trial. On the other hand, if the state alleges "four or more," there is no limit to the number which may be proven.

Id. at 248, 729 S.W.2d at 170.

See, also *Shells v. State*, 22 Ark. App. 62, 733 S.W.2d 743 (1987).

Section 5-4-501 Authorizes 348 Year Sentence

The Arkansas Supreme Court has upheld a sentence of 348 years imposed by a jury for robbery under § 5-4-501 upon appellant, a habitual offender with eight prior felony convictions. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987). Section 5-4-501(b)(1) permits a sentence to "a term of not less than forty (40) years nor more than life." The majority held that "there is no provision under Arkansas law or the United States Constitution which prohibits a sentence of a term of years which exceeds the usual life span of hu-

man beings." 294 Ark. at 130, 741 S.W.2d at 248. Justices Purtle and Hays dissented on grounds that a 348 year sentence is in effect a sentence to life imprisonment without parole and is hence illegal since the statute authorizes only a sentence to "life."

Resentencing Prohibited after Failure of Proof on Enhancement Issue at First Trial

The Eighth Circuit Court of Appeals has decided that the double jeopardy clause of the Fifth Amendment to the Federal Constitution prevents the retrial of a defendant previously sentenced as an habitual offender as a result of consideration of a felony conviction later found to have been nullified by pardon. *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987), cert. granted, — U.S. — (1988). Appellant had pled guilty to burglary and theft and had been sentenced to a twenty year sentence after the State produced evidence of four prior felony convictions. It was later discovered, and the State confessed on appeal, that one of the prior felonies had been pardoned. The District Court held that double jeopardy protections attached in a hearing on sentencing where the sentencing procedure "was itself a trial on the punishment . . .," *id.* at 447, quoting from *Bullington v. Missouri*, 451 U.S. 430, 68 L. Ed. 2d 270 (1981). The Court of Appeals agreed with the District Court that the sentencing procedure constituted a "trial on the punishment." While agreeing with the State that, in general, reversal on appeal solely on the basis of trial error — a determination that a defendant was convicted through defective judicial process — does not provide immunity from a second prosecution, the Court of Appeals found the failure of proof in the case at bar not attributable to trial error. It agreed with the District Court that the proceed-

ings had "all the 'hallmarks of the trial on guilt or innocence.'" 828 F.2d at 448, quoting from *Bullington v. Missouri*.

The implications of the *Nelson* decision on cases involving other kinds of errors in sentence enhancement under subchapter 5 of the Code were not explored. It is not clear, for instance, whether a defendant whose sentence was enhanced by a subsequently reversed conviction can be retried or resentenced. See, e.g., *Halfacre v. State*, 292 Ark. 331, 731 S.W.2d 179 (1987).

Convictions in Other Jurisdictions: What Constitutes Felony

In determining whether a conviction of an offense in another jurisdiction constitutes a felony that can be used for enhancement under § 5-4-501, the trial court should look to the "imprisonment for a term in excess of one (1) year" standard supplied by § 5-4-503, not the Ark. Stat. Ann. § 43-2329 (Repl. 1977) [§ 16-90-203] standard stating that a conviction in another jurisdiction is a conviction of a felony only if the offense would have been a felony if committed in Arkansas. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986) (reaffirming decision in *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503 (1978) that § 43-2329 [§ 16-90-203] has been superseded by § 41-1002 (Repl. 1977) [§ 5-4-503 (1978)]).

Error in Permitting Jury to Determine Number of Previous Convictions Not Grounds for Federal Habeas Corpus Relief

Though Arkansas law is clear that the judge, not the jury, should determine whether the defendant is an habitual offender, a trial court's permitting a jury to decide the number of previous convictions does not constitute error so egregious as to violate due process requirements. *Loveless v. Lockhart*, 765 F.2d 742 (8th Cir. 1985).

Original Commentary to § 5-4-502

This section is taken, almost verbatim, from previous authority formerly found at Ark. Stat. Ann. § 43-2330.1 (Supp. 1973). Subsection (1) does not contain the proviso in § 43-2330.1(1) that "nothing herein shall prohibit cross-examination of a defendant as to previous convictions when the defendant takes the stand in his own defense." The Commission deemed

the proviso superfluous since it would require an exceedingly strained construction of the section to interpret it as abolishing the state's right, under authority previously found at Ark. Stat. Ann. § 28-707 (Repl. 1962), to impeach a defendant-witness by showing previous felony convictions.

Again, "finding of guilt" terminology has

been supplied by Act 474 of 1977 to permit such proof in proceedings under § 5-4-501.

1988 Supplementary Commentary to § 5-4-502

The procedure for imposing sentence on a defendant who has one or more prior felony convictions was revised by Act 252 of 1981. Prior to the change, § 5-4-502 provided for a bifurcated trial. During the first phase the jury considered only whether the defendant was guilty of the offense currently charged. If the jury returned a verdict of guilty, it then heard evidence of prior convictions and retired a second time to determine sentence. Under the revised procedure, the bifurcated trial is retained, but the trial judge rather than the jury determines the number of prior felony convictions and instructs the jury accordingly as to sentencing ranges.

Several defendants have argued that the revised procedure violates Article 7, § 23 of the Arkansas Constitution which prohibits judges from charging juries with regard to matters of fact. The Supreme Court initially avoided a direct ruling on the question by holding that it need not be reached in a case in which the number of prior felony convictions was undisputed. *Gilbert v. State*, 277 Ark. 61, 639 S.W.2d 346 (1982); *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982). In *Shockley v. State*, 282 Ark. 281, 668 S.W.2d 22 (1984), the Court held that it was not error for the trial court to instruct the jury on the number of prior felony convictions of the defendant because the question was one of law rather than fact. A concurring justice saw no constitutional problem with the procedure since any "fact" related to prior convictions affected only the punishment of the defendant, and the trial court, not the jury, set punishment at the time Article 7, § 23 was adopted.

The burden of proof with respect to prior convictions is the same as that applicable to the offense itself — i.e., the prosecution must prove the prior convictions beyond a reasonable doubt. Section 5-4-504 and *Leggins v. State*, 267 Ark. 293, 590 S.W.2d 22 (1979). The defendant may controvert evidence of a prior conviction by showing that the evidence of the conviction is inadmissible (e.g., that a copy of a conviction record lacks the certificate required by § 5-4-504), that there was a

procedural defect in the prior conviction (e.g., that he was not represented by counsel), or that he is not the person named in the record of a prior conviction. A properly established prior conviction is *res judicata* on the question of the defendant's guilt, however, and the defendant is not permitted to relitigate a claim that he was innocent of the felony of which he was previously convicted. *Harris v. State*, 273 Ark. 355, 620 S.W.2d 289 (1981). Nor may the defendant offer evidence in mitigation of punishment since the sole purpose of the second stage of the bifurcated proceeding is to allow the jury to consider possible enhancement of sentence, not its reduction. *Heard v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981).

See AMCI 6002, 7000-7008.

Enhancement by Proof of Conviction on Direct Appeal

The Court of Appeals and the Supreme Court have held that felony convictions on appeal may be used to enhance a sentence under the habitual offender provisions of the code. *Hill v. State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985); *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985). See also, Commentary to § 5-4-501.

The Court of Appeals has expressed the rationale for permitting enhancements under these circumstances as follows:

Adopting the theory advanced by the appellant would result, as a practical matter, in rarely ever being able to apply the habitual criminal statutes, since criminal defendants have numerous avenues through which to seek relief, including direct appeal, petitions under Rule 37, and federal habeas corpus petitions. We do not believe that the legislature intended the result urged by the appellant.

13 Ark. App. at 310, 683 S.W.2d at 630.

The Arkansas Supreme Court has declined to modify the rule of *Glick* and *Hill* by excluding convictions on direct appeal from general rule permitting introduction for enhancement. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987). Instead, the Court has left defendants receiving enhanced sentences based on convictions

subsequently reversed to Rule 37 relief, rejecting contentions that this is "unsatisfactory and ineffective because [defendants are] not entitled to an attorney under that rule." 291 Ark. at 381, 724 S.W.2d at 493. The Court has observed that "while a petitioner has no right to counsel at the time he prepares a Rule 37 petition, the procedure in preparing such a verified petition is uncomplicated and it is the established practice in Arkansas for the courts to be liberal in allowing amendments to such petitions." *Id.* at 381, 724 S.W.2d at 493.

Where a conviction used to enhance is later reversed, *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987), *cert. granted*, — U.S. — (1988), may prevent a retrial. See Supplementary Commentary to § 5-4-501.

Bifurcated Trial Procedure Not Unfair

On several occasions appellants have urged that seasoned jurors will realize that an accused is an habitual offender if sentencing instructions are not given with instructions about guilt or innocence at the conclusion of the trial. The Arkansas

Supreme Court has consistently rejected this argument. *Houston v. State*, 293 Ark. 492, 739 S.W.2d 154 (1987); *Burris v. State*, 291 Ark. 157, 722 S.W.2d 858 (1987); and *Woods v. State*, 260 Ark. 882, 545 S.W.2d 912 (1977).

Prejudicial Error to Provide Jury with Record of Previous Convictions

In *Jones v. State*, 283 Ark. 308, 675 S.W.2d 825 (1984), the Court found that the trial court did not err in refusing to permit documentary evidence of prior convictions to be given to the jury for its inspection. Subsequently, in *Graham v. State*, 290 Ark. 107, 717 S.W.2d 203 (1986), the Court observed that "evidence of prior convictions is made a part of the record for appeal purposes [but] such material is not introduced into evidence to be considered by the jury. Therefore, it is prejudicial error for the Court to provide the jury with documents which have not been introduced into evidence." *Id.* at 112, 717 S.W.2d at 205. The Court did not discuss how appellant was prejudiced. Justices Hickman and Hays dissented.

Original Commentary to § 5-4-503

Section 5-4-503 ensures that felony convictions or findings of guilt (See Act 474 of 1977) in other jurisdictions may be taken into account when applying § 5-4-501. The earlier statute, Ark. Stat. Ann. § 43-2329 (Repl. 1964), treated a conviction of an offense in another jurisdiction as a felony conviction if the offense would have been a felony had it been committed in Arkansas. This may have created interpretation problems when the previous conviction was for an offense that had no precise counterpart in Arkansas law —

e.g., a federal court conviction for wiretapping. The Code approaches the problem by looking to the law of the jurisdiction in which the defendant was previously convicted. If a sentence in excess of one year in prison was authorized upon conviction in the other jurisdiction, then regardless of the sentence actually received, the defendant has a previous felony conviction or finding of guilt for purposes of § 5-4-501.

See AMCI 7001, 7001-A, 7002.

1988 Supplementary Commentary to § 5-4-503

Convictions in Other Jurisdictions: What Constitutes Felony

In determining whether a conviction of an offense in another jurisdiction constitutes a felony that can be used for enhancement under § 5-4-501, the trial court should look to the "imprisonment for a term in excess of one (1) year" standard supplied by § 5-4-503, not the Ark. Stat. Ann. § 43-2329 (Repl. 1977) [§ 16-90-

203] standard stating that a conviction in another jurisdiction is a conviction of a felony only if the offense would have been a felony if committed in Arkansas. *McGirt v. State*, 289 Ark. 7, 708 S.W.2d 620 (1986) (reaffirming decision in *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503 (1978) that § 43-2329 [§ 16-90-203] has been superseded by § 41-1002 (Repl. 1977) [§ 5-4-503 (1987)]).

Original Commentary to § 5-4-504

Section 5-4-504 is adapted from former Ark. Stat. Ann. § 43-2330 (Repl. 1964). The major changes are found in the introductory language. The Commission wished to make clear the fact that the state may prove a previous felony conviction by means other than introduction of one of the certificates described in the statute. The Supreme Court has already reached the same conclusion. *Thompson v. State*, 252 Ark. 1, 477 S.W.2d 469 (1972). Section 41-1003 uses "sufficient to support a finding" in place of the earlier terminol-

ogy "prima facie evidence." The substituted language is intended to achieve the same effect — i.e., introduction of evidence of a previous felony conviction in any of the specified forms compels submission of the issue to the jury and requires sustaining, on appeal, the jury's finding that a previous felony conviction exists.

The section has also been amended by Act 474 of 1977 to permit a prior finding of guilt to be established for purposes of sentencing under § 5-4-501.

1988 Supplementary Commentary to § 5-4-504

Method of Proof

The State is not limited to the methods of proving prior convictions described in this section. *Ply v. State*, 270 Ark. 554, 606 S.W.2d 556 (1980); *Elmore v. State*, 268 Ark. 225, 595 S.W.2d 218 (1980). The Supreme Court has affirmed a judgment in which the State proved prior convictions by calling the circuit clerk who testified as to docket entries involving the defendant. *Reeves v. State*, 263 Ark. 227, 564 S.W.2d 503, *cert. denied*, 439 U.S. 964 (1978). The Court of Appeals held sufficient proof based on the testimony of a police officer to whom the defendant admitted prior felony convictions during interrogation following his arrest, but it reversed judgment because the state failed to show that defendant was represented by counsel on any of the prior convictions. *Addington v. State*, 2 Ark. App. 7, 616 S.W.2d 742 (1981).

Idem Sonams Doctrine

The State makes a prima facie case of a prior conviction when it introduces properly certified records of a conviction of a person with the same or substantially the same name as the defendant. The burden of going forward then shifts to the defendant to introduce evidence that he is not the person named in the records. Whether or not the defendant introduces such evidence, the State still bears the burden of proving beyond a reasonable doubt that the defendant is the person named in the records. See *Higgins v. State*, 235 Ark. 153, 357 S.W.2d 499 (1962), the holding of which was reaffirmed in *Leggins v. State*, 267 Ark. 293, 590 S.W.2d 22 (1979). In

determining what is the same or substantially the same name, the court may invoke the doctrine of *idem sonams*. See *Guzman v. State*, 625 S.W.2d 540 (1981) ("Gregorio Orozo" the same as "Gregorio Orozco"). See, also, the following pre-Code cases: *Woods v. State*, 123 Ark. 111, 184 S.W. 409 (1916) ("Woods" not the same as "Wood"); *Godard v. State*, 100 Ark. 149, 139 S.W. 1131 (1911) ("Vaughn" the same as "Vaughan"); and *Taylor v. State*, 72 Ark. 613, 82 S.W. 495 (1904) ("Forshee" the same as "Foshee"). Conviction records are also prima facie evidence of a prior conviction if they list an alias which is the name of the defendant. *Guzman v. State*, *supra*; *Hanson v. State*, 248 Ark. 992, 455 S.W.2d 101 (1970).

The hair-splitting that sometimes occurs because of variations in the spelling of a name is illustrated by *Leggins v. State*, *supra*. In the first appeal in that case the Supreme Court reduced the sentence of the defendant from 30 to 10 years because it could not stretch "Leggins," the name under which defendant was convicted, to reach "Ligion," the name shown on a record of a prior conviction in an adjoining county. The state chose to retry the defendant rather than accept the reduction in sentence. In the second trial the state introduced the defendant's affidavit of indigency form in which he signed his name as "Liggion." On appeal, the Court held that "Liggion" was sufficiently close to "Ligion" to cure the evidentiary deficiency of the first trial and affirmed a sentence to consecutive life terms. *Leggins v. State*, 271 Ark. 616, 609 S.W.2d 76 (1980).

The defendant can obviate the need to introduce evidence of prior convictions by stipulating to the convictions, but the trial court must ensure that the defendant voluntarily and intelligently agreed to the stipulation and that he was in fact represented by counsel in connection with the earlier convictions. *McCroskey v. State*, 272 Ark. 356, 614 S.W.2d 660 (1981). Compare *Cox v. Hutto*, 619 F.2d 731 (8th Cir. 1980) and *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979) which adopt a stricter test.

Enhancement by Proof of Conviction on Direct Appeal

The Court of Appeals and the Supreme Court have held that felony convictions on appeal may be used to enhance a sentence under the habitual offender provisions of the code. *Hill v. State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985); *Glick v. State*, 286 Ark. 133, 689 S.W.2d 559 (1985). See also commentary to § 5-4-501.

The Court of Appeals has expressed the rationale for permitting enhancements under these circumstances as follows:

Adopting the theory advanced by the appellant would result, as a practical matter, in rarely ever being able to apply the habitual criminal statutes, since criminal defendants have numerous avenues through which to seek relief, including direct appeal,

petitions under Rule 37, and federal habeas corpus petitions. We do not believe that the legislature intended the result urged by the appellant.

13 Ark. App. at 310, 683 S.W.2d at 630.

The Arkansas Supreme Court has declined to modify the rule of *Glick* and *Hill* by excluding convictions on direct appeal from general rule permitting introduction for enhancement. *Birchett v. State*, 291 Ark. 379, 724 S.W.2d 492 (1987). Instead, the Court has left defendants receiving enhanced sentences based on convictions subsequently reversed to Rule 37 relief, rejecting contentions that this is "unsatisfactory and ineffective because [defendants are] not entitled to an attorney under that rule." 291 Ark. at 381, 724 S.W.2d at 493. The Court has observed that "while a petitioner has no right to counsel at the time he prepares a Rule 37 petition, the procedure in preparing such a verified petition is uncomplicated and it is the established practice in Arkansas for the courts to be liberal in allowing amendments to such petitions." *Id.* at 381, 724 S.W.2d at 493.

Where a conviction used to enhance is later reversed, *Nelson v. Lockhart*, 828 F.2d 446 (8th Cir. 1987), *cert. granted*, — U.S. — (1988), may prevent a retrial. See Supplementary Commentary to § 5-4-501.

Original Commentary to § 5-4-505

Section 5-4-505, which is based on earlier authority found at Ark. Stat. Ann. § 43-2336 (Supp. 1973), increases by 15 years the maximum term for a felony, if the defendant employed a firearm to commit it. Under old law, the sentencing authority imposed a sentence for the felony and a separate consecutive sentence of up to 15 years for the use of a firearm. See prior law formerly found at Ark. Stat. Ann. § 43-2337 (Supp. 1973).

Section 5-4-505 operates somewhat differently. It increases by 15 years the maximum term otherwise authorized by §§ 5-4-401 and 5-4-501. For example, the defendant who commits a class B felony using a firearm may be sentenced to imprisonment for a term of years ranging

from 3 to 35 years rather than the normal 3 to 20 years. An increase in the maximum term is authorized only if the jury determines that a firearm was employed by the defendant. The procedures for ascertaining such a fact are left to the discretion of the court. A bifurcated trial is one solution; another is submission of a special verdict form allowing such a finding.

Subsection (b) is necessitated by the fact that a number of Code offenses are graded more severely when a deadly weapon is involved. It is obviously unfair to convict a person of a more serious felony because he used a deadly weapon and then further increase the penalty for the felony because the deadly weapon was a firearm.

1988 Supplementary Commentary to § 5-4-505

Firearm Finding

As originally enacted, this section extended by 15 years the maximum sentence otherwise permissible upon conviction of a felony when the "trier of fact" found that a firearm was employed to commit the felony. Act 252 of 1981 amended the section to provide that the trial court rather than the jury determines whether the defendant employed a firearm to commit a felony. The constitutionality of the change under Article 7, § 23 of the Arkansas Constitution has not been decided. The Court has found that it is permissible for the trial judge to preliminarily rule that there is sufficient evidence to instruct on the issue and then (in contravention of the statute) to submit to the jury instructions permitting it to decide the issue. *David v. State*, 286 Ark. 205, 691 S.W.2d 133 (1985). See, also, *Shockley v. State*, 282 Ark. 281, 668 S.W.2d 22 (1984) (Not a violation of Arkansas Constitution art. 7, § 23 for trial judge to instruct jury on number of previous felony convictions of defendant for enhancement purposes under § 5-4-502, the number of previous convictions being a matter of law).

To determine the sentencing ranges applicable to an offense committed with a firearm, the extended term of imprisonment provided by § 5-4-505 must be considered in conjunction with Act 583 of 1981, codified as Ark. Stat. Ann. § 16-90-121, which prescribes a minimum sentence of 10 years for the commission of a felony involving use of a "deadly weapon." The sentencing ranges are further complicated by the fact that the extended penalty of § 5-4-505 is inapplicable when an element of the felony is the use, possession, furnishing, or carrying of, or being armed with a firearm. Section 16-90-121 applies whether or not use of a deadly weapon is an element of the felony.

The original § 5-4-505 did not establish a procedure for ascertaining when a firearm had been employed in the commission of a felony. Unlike evidence of a prior felony conviction, evidence that the offense currently charged was committed with a firearm can be considered by the jury at the same time it considers whether the defendant is guilty of the offense cur-

rently charged. For this reason, the Code did not mandate a bifurcated proceeding in every case in which the prosecution sought to enhance the sentence due to use of a firearm. The original Commentary specifically mentioned a special verdict form as one way to submit to the jury at the same time the questions whether defendant committed the offense charged and whether he used a firearm to the jury at the same time. In view of the sentencing alternatives now available as well as the possibility that the trial court's finding on the firearm issue will prejudice the jury's deliberations, a bifurcated trial may now be necessary in all cases in which an enhanced maximum and/or minimum penalty is sought. A bifurcated approach has been adopted by the drafters of the AMCI. See AMCI 6001-6003, 6106-6110A, 7000-7003.

The Supreme Court added some judicial gloss to the term "employed" as used in this section in *Jordan v. State*, 274 Ark. 572, 626 S.W.2d 947 (1982), when it held that more than mere possession of a firearm during the commission of a felony is required in order to invoke the section. Instead, the Court endorsed a line of California cases interpreting the term "use" in a similar firearm enhancement statute to mean "to carry out a purpose or action by means of," to "make instrumental to an end or process," and to "apply to advantage." See *People v. Chambers*, 498 P.2d 1024, 1028 (1972); *In re Culbreth*, 551 P.2d 23 (1976).

Successive Trials: No Res Judicata Effect of Jury Verdict on Firearm in First Trial

Appellant was initially convicted of kidnapping, burglary, and rape. The jury found that he did not use a firearm in the commission of these offenses. The guilty verdicts were reversed on appeal. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984). Appellant was retried on kidnapping charges. The trial court permitted prosecution witnesses to testify that appellant used a firearm. Appellant was again convicted of kidnapping and on appeal argued for a reversal on grounds of *res judicata* and law of the case. He claimed that the verdict of the first jury that he had not used a firearm precluded State's witnesses from testifying that he

was armed in the second trial, even though no enhancement under § 5-4-505 was sought at the latter trial. The Court agreed with appellant that he could not be tried again for using a firearm, but it found that the trial court had not committed error by permitting witnesses to testify that appellant had a firearm. The Court opined as follows:

Whether Hickerson used a gun was not an issue on retrial, but the victim's perception of the events was relevant. The evidence of the use of the gun was obviously relevant, although not essential, to the charge of kidnapping which contains the element of restraint without consent. ... So, the admissibility of testimony regarding the gun was not precluded by the doctrine of *res judicata* or law of the case on a retrial.

Hickerson v. State, 286 Ark. 450, 452, 693 S.W.2d 58, 59 (1985).

Justice Purtle dissented, arguing that the firearm issue was conclusively settled in the first trial.

The issue raised is a perplexing one. The majority opinion cites 2 *Weinstein's Evidence* § 404 (10) (1984). This states:

Most courts allow the use of evidence previously introduced on counts on which defendant has been *acquitted*, or as to which there has been a *dismissal*, since the prior acquittal or

dismissal indicates only that the prosecution did not prove the underlying facts beyond a reasonable doubt, a higher standard than is ordinarily required for the introduction of other crimes evidence. However, a number of courts have, somewhat illogically, extended the doctrine of collateral estoppel to this area, holding that an acquittal bars the prosecution from using evidence of that offense as other crimes evidence at a subsequent trial. (Emphasis added.)

Whether this rationale supports the conclusion reached in *Hickerson* is questionable. The jury verdict at the conclusion of the first trial was in the form of a special verdict with a specific finding that defendant did not use a firearm. This case therefore differs from those where the jury acquitted the defendant on the initial charge and a trial follows at which witnesses testify about conduct also disclosed at the first trial. It cannot be argued, for example, that the first jury found that appellant did not use a firearm in the course of committing a felony because he did not commit the felony charged. In *Hickerson* the first jury *convicted* appellant of the felonies charged but explicitly found that he did *not* do so with a firearm. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984).

See supplementary commentary to §§ 5-1-112 and 113.

Original Commentary to § 5-4-601

Indicative of the still unsettled state of the law with regard to the constitutionality of various procedures for imposing the death penalty is that *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), prompted nine separate opinions and that subsequent cases, while clearing up matters somewhat, have been decided by plurality opinions. *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L.Ed.2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L.Ed.2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976).

In view of this, the Code includes a

declaration of legislative intent designed to salvage the valid portions of subchapter 6 of chapter 4 in the event that Arkansas's statutory scheme for imposing the death penalty is declared unconstitutional. Capital murder would thereafter carry a mandatory penalty of life imprisonment without parole.

Subsection (b) would not be triggered by a decision that invalidated a particular provision while leaving the broader statutory scheme intact. If, for example, authorizing the prosecutor to waive the death penalty were declared unconstitutional, the offending provisions would be eliminated, and the general severability section would preserve the remaining provisions of the chapter.

Original Commentary to § 5-4-602

The Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), that arbitrary imposition of capital punishment is unconstitutional prompted a variety of legislative responses. Some states made the death penalty mandatory upon conviction of certain offenses. Such across-the-board mandatory provisions were struck down by *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), although a mandatory death penalty may be permissible in narrowly circumscribed circumstances. See, *Roberts v. Louisiana*, 331 So.2d 11, cert. granted, 429 U.S. 938, 97 S. Ct. 352, 50 L. Ed. 2d 307, grant of cert. limited to "[w]hether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States," 429 U.S. 975, 97 S. Ct. 483, 50 L. Ed. 2d 583 (1976).

Other jurisdictions established detailed guidelines governing the imposition of a sentence of death. The Arkansas legislature adopted the latter approach by passing Act 438 of 1973, previously codified as Ark. Stat. Ann. §§ 41-4701 *et seq.* (Supp. 1973). Since the merits of the various procedures for imposing the death penalty, as well as the propriety of capital punishment per se, were extensively debated at the 1973 Regular Session, the Commission felt constrained to incorporate Act 438 virtually intact into subchap-

ter 6 of chapter 4 of the Code. Recent events indicate the wisdom of this course: Arkansas's statute has repeatedly been declared constitutional by the Arkansas Supreme Court. See, e.g., *Hulsey v. State*, 261 Ark. 449, 549 S.W.2d 73 (1977); *Gills v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977); *Neal v. State*, 261 Ark. 336, 548 S.W.2d 135 (1977); *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977). The United States Supreme Court has recently held constitutional a statute very similar to Arkansas's. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). See, also, *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976); *Woodson, supra*; *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). The deviations from Act 438 are primarily stylistic changes designed to improve clarity.

Section 5-4-602, which provides for bifurcated trial of capital offenses, is based on former Ark. Stat. Ann. § 41-4710(a)-(c). Section 5-4-602(2) has been added to make it clear that the second phase of a capital trial is necessary only if the jury determines that the defendant is guilty of a capital offense. Prior law dictated the same result, though somewhat less perspicuously. See former Ark. Stat. Ann. § 41-4709 (Supp. 1973) ("A person convicted of a felony shall be punished ... as ... provided by law").

1988 Supplementary Commentary to § 5-4-602

Constitutional Effect of Death Qualification of Jurors Deciding Guilt Phase of Capital Prosecution

The United States Supreme Court has found that the Sixth Amendment requirement that a jury represent a fair cross section of the community is not violated by excluding prospective jurors for cause over the objection of defendant prior to the guilt phase of a bifurcated trial on grounds that the jurors have reservations about the death penalty that would substantially impair their performance at the sentencing phase. *Lockhart v. McCree*, 476 U.S. 162, 90 L. Ed. 2d 137 (1986),

reversing *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985). Nor do such for cause exclusions violate the Sixth Amendment right to be tried by an impartial jury. The Court assumed for the purposes of its opinion that the studies relied upon below by the District Court and the Eight Circuit Court of Appeals were "both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'nondeath-qualified' juries." 90 L. Ed. 2d at 147. The Court went on to hold "nonetheless, that the Constitution does not prohibit the States from 'death quali-

ying' juries in capital cases." *Id.* at 147.

The events leading up to the Court's decision in *Lockhart v. McCree* are traced below.

"Death Qualification" of Veniremen

"Death qualification" of veniremen in capital cases has for some time been a much litigated issue. Recently, federal and state court decisions have provided sharply conflicting resolutions of the constitutional issues presented by this process. An exhaustive examination of the cases is beyond the scope of this commentary, but a brief discussion of recent cases follows.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968) the United States Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. The petitioner argued that death-qualified jurors are partial to the prosecution on the issue of guilt or innocence, but the Court declined to rule on this contention in view of the "tentative and fragmentary" nature of the evidence of record. *Id.* at 517. The Arkansas Supreme Court has interpreted *Witherspoon* to mean that veniremen to hear evidence on the issues of guilt and sentence may be excused for cause only if they state that they would automatically vote against imposition of the death penalty, regardless of the evidence at trial. Jurors having scruples against capital punishment but stating that they would consider imposition of the death penalty depending upon the evidence in the case cannot be excluded.

In *Grigsby v. Mabry*, 637 F.2d 525 (8th Cir. 1980) (*Grigsby-1*) the court reviewed the order of an Arkansas federal district court requiring state courts to grant appellant an evidentiary hearing on his claim that determination of his *guilt* by a "death-qualified" jury deprived him of trial by a fair and impartial jury. The district court had held that the state trial court had abused its discretion in denying appellant a continuance in order to gather evidence to show that "death-qualified" juries are prone to convict. The Court of Appeals remanded the case to the district

court for an evidentiary hearing. In so doing, the Court of Appeals stated:

The record demonstrates that Grigsby did not receive a full and fair evidentiary hearing in state court on three factual issues: (1) whether death-qualified jurors are more likely to convict than jurors selected without regard for their views on the death penalty, (2) whether death-qualified jurors are more likely to convict of a higher degree of murder than jurors selected without regard for their death penalty views, and (3) whether the jurors in this case were in fact death-qualified. *These questions must be answered because if they are answered in the affirmative, Grigsby has made a case that his constitutional rights have been violated and he would be entitled to a new trial.*

Id. at 527 (emphasis added).

The Eighth Circuit Court of Appeals thus seemingly held that a jury composed of death-qualified jurors is unconstitutional under *Witherspoon*, *supra*, if the death qualification process produces a jury more likely to convict than one selected without regard to the members' views on the death penalty. As pointed out in *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983) the circuits are divided on this question. The Seventh Circuit declined to reach a conclusion on this question on grounds that available studies still require speculation and are inconclusive. *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976). On the other hand, in *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), the Fifth Circuit approved capital convictions imposed by death-qualified juries, assuming without deciding that they are more prone to convict than nondeath-qualified juries. The *Spinkellink* decision was recently followed in *Smith v. Balkom*, 660 F.2d 573 (5th Cir. 1981) where the court opined that "the logical converse of the proposition that death-qualified jurors are conviction prone is that nondeath-qualified jurors are acquittal prone, not that they are neutral." *Id.* at 579.

In any event, pursuant to the mandate of the Court of Appeals, *Grigsby v. Mabry*, 569 F. Supp. 1273 (D.C.E.D. Ark. 1983) (*Grigsby-2*) was decided on August 5, 1983. In a voluminous opinion, the federal

district court found that Arkansas's death-qualification process was unconstitutional under the Sixth and Fourteenth Amendments to the Federal Constitution in denying an accused a trial by a jury representative of a cross-section of the community and in creating juries that are conviction-prone. *Grigsby-2* at 1275.

The *Grigsby-2* court found that Ark. Stat. Ann. § 43-1920 (Repl. 1977) [§ 16-33-304] was for more than a century interpreted to permit a venireman in a capital case to be challenged for cause only if he could under no circumstances find the defendant guilty because of his views on the death penalty. The district court noted that if *Atkins v. State*, 16 Ark. 568 (1855) and successor cases interpreting § 43-1920 had been followed by Arkansas courts petitioners would have prevailed on their contentions in the state courts.

Relying on cases such as *Davis v. State*, 246 Ark. 838, 440 S.W.2d 244 (1969), the district court went on to find that Arkansas law was reinterpreted as a result of the decision in *Witherspoon*, *supra*, with the result that potential jurors were permitted to be challenged for cause as ineligible to determine the accused's *guilt* if they were opposed to imposition of the *penalty* sought — death — regardless of whether the veniremen's views on the death penalty would preclude them from finding the defendant guilty. *Id.* at 1314-19. Finding that Arkansas's exclusion process could not be justified, the court proposed a bifurcated system under which separate juries would determine guilt and sentence, with death qualification being permissible only in selection of the sentencing jury. The Arkansas Supreme Court had previously rejected suggestions that this procedure was required, while noting that *Grigsby-1* was pending on remand. *Lasley v. State*, 274 Ark. 352, 625 S.W. 2d 466 (1981).

Two months after *Grigsby-2* was decided, the Arkansas Supreme Court decided *Rector v. State*, 280 Ark. 385, 659 S.W. 2d 168 (1983) in which it took issue with the district court's analysis of Arkansas law. The Court pointed out that when § 43-1920 [§ 16-33-304] was enacted, the death penalty was *mandatory* upon conviction of a capital offense, so that exclusion of a venireman implacably opposed to the death penalty was necessary if the judicial process was not to be thwarted.

The Court approved death qualification of veniremen, *Rector* went on to state, not as a result of *Witherspoon* but as a result of a 1915 statute providing life imprisonment as a permissible alternative sentence in all capital cases. Ark. Stat. Ann. § 43-2153 [superseded]. See *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785 (1949).

The *Rector* Court then went on to analyze the district court's findings and assumptions in *Grigsby-2*. In regard to whether "conviction-prone juries are for that reason unconstitutional", the Court adopted the *Spinkellink* court's assumption that death-qualified jurors are more prone to convict. The *Rector* Court then opined that "we cannot regard conviction-proneness either as inherently wrong or as destructive of the juror's impartiality," *Rector* at 393, 659 S.W.2d at 172, and went on to find that the *Grigsby-2* successive jury proposal was unacceptable on a number of grounds. In so finding, the *Rector* Court stated:

Our second reason for disagreeing with the *Grigsby* conclusion is a practical one: A jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors.

Rector at 395, 659 S.W. 2d at 173.

When one takes into account that the Court is here describing procedures to be followed in trials of defendants who are presumed innocent, this rationale is questionable. An unsophisticated observer might infer that the Court is opining that as a threshold matter persons *accused* of capital offenses are, *ipso facto*, "least entitled to special favors," even though no finding of guilt has been made. See the concurring opinion of Justice Purtle. Rejecting the *Grigsby-2* court's holdings, *Rector* affirmed appellant's conviction of capital murder and the death penalty imposed.

The Eighth Circuit Court of Appeals held that a capital jury, with all persons unable or unwilling to consider or impose the death penalty excluded, is conviction prone and does not represent a cross-section of the community. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985). Such a jury was found not to meet sixth amendment standards. The lower court's order

that separates juries be impaneled to determine guilt and sentence was vacated, the means of compliance being reserved to the state.

Finally, as indicated above, *Grigsby v. Mabry* was reversed by the United States Supreme Court *sub nom. Lockhart v. McCree*.

Standard to Be Used by Trial Court to Determine Whether Juror is Excludable for Cause

In deciding to excuse for cause a juror having scruples against the death penalty, the trial court should consider "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Williams v. State*, 288 Ark. 444, 705 S.W.2d 888 (1986), citing *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). The Arkansas Supreme Court rejected appellant's contentions that the trial court should have inquired if the scrupled jurors in question could have set aside their convictions in determining the guilt or innocence of appellant before the trial's sentencing phase.

Sentencing: Constitutionality of Sentences; Review by Supreme Court

The Court has held that imposition of a sentence within statutory limits is not cruel and unusual punishment. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981). Neither a sentence of death, *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), nor one of life imprisonment without parole, *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979), violates the Eighth Amendment to the federal constitution. For a discussion of the evolution of Arkansas law on when the Court will reduce or modify a sentence, see supplementary commentary to § 5-4-401. Generally speaking, the Arkansas Supreme Court compares sentences in capital cases and reduces sentences produced, for instance, by passion or prejudice. See, *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, *cert. denied*, 434 U.S. 894 (1977) where the Court reduced from death to life imprisonment without parole the sentence of a mentally deficient defendant where the jury failed to find this a mitigating factor. Compare, *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983) (mental deficiency arising after offense as result of suicide

attempt did not justify reduction of death sentence). See also, *e.g.*, *Henry v. State*, 278 Ark. 478, 647 S.W. 2d 419 (1983); *Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982); *Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 (1981).

In *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), the court stated:

In *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), we noted the power of the trial court to reduce a death sentence to life imprisonment and in that opinion we committed this court to a policy of comparative review, by examining the death penalty in every case on a comparable basis. We have demonstrated our readiness to modify the death sentence where it is imposed capriciously (see *Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 1981), or where the culpability of co-felons is disproportionate (see *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419 (1983), or where death is unduly harsh under the circumstances (*Neal v. State*, 274 Ark. 217, 623 S.W.2d 191 (1981) and *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977)).

Id. at 84-85, 656 S.W.2d at 687.

See also, *Collins v. State*, 280 Ark. 312, 657 S.W.2d 546 (1983) for an exhaustive enumeration of cases where death sentences were vacated as inappropriate.

The United States Supreme Court has recently decided that the Eighth Amendment to the Federal Constitution does not require a state appellate court to compare the sentence of the appellant with penalties imposed in other similar cases before it affirms a death sentence. *Pulley v. Harris*, 465 U.S. 37 (1984). It remains to be seen whether the Arkansas Supreme Court will continue its policy of proportionality review in cases where the death penalty has been imposed. To date the Court has continued this practice, but the Chief Justice has suggested that it be abandoned. *Pruett v. State*, 282 Ark. 304, 669 S.W. 2d 186 (1984).

For sentencing procedures on remand due to reversal based upon error in the original sentencing phase of trial, see § 5-4-616.

Sentencing of Multiple Defendants

Though a unanimous Court in *Rector*, *supra*, criticized the federal district court's proposal entailing the empaneling of separate juries for the trial and sentencing

phases of a capital case, the Court is not of one mind on the related subject of whether the same sentencing jury should be permitted to set punishment of more

than one defendant where several defendants are jointly tried. See Justice Dudley's dissent in *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983).

Original Commentary to § 5-4-603

Section 5-4-603 is essentially a restatement of prior authority previously codified as Ark. Stat. Ann. § 41-4710(d)-(f) (Supp. 1973) with minor revisions designed to clearly outline the jury's decisional process and allocate the burden of proof during the second phase of a capital trial. Sections 41-4710(d)(i) and (e)(i) required the jury to find "that sufficient aggravating circumstances exist[ed] beyond a reasonable doubt to justify a sentence of death." Section 5-4-603 establishes a procedure pursuant to which the jury must ascertain whether aggravating circumstances (1) exist, (2) outweigh mitigating circumstances, and (3) justify a death sentence, all beyond a reasonable doubt. Prior law was ambiguous as to the burden of proof with regard to mitigating circumstances, providing only that the jury had to determine whether sufficient mitigating circumstances existed to outweigh the aggravating circumstances or to justify a sentence to life imprisonment without parole. See prior authority formerly codified as Ark. Stat. Ann. §§ 41-4710(d)(ii) and

(e)(ii). The Code makes it clear that a sentence of death is authorized only if the jury finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

In addition, pursuant to Act 474 of 1977, the introductory language of subsection (a) has been modified to require a jury to return a death sentence upon making all findings necessary to do so. This amendment was suggested by the constitutional prohibition of permitting juries unbridled sentencing discretion in capital cases. Under previous law a jury making all necessary findings for imposition of the death penalty could nevertheless return a lesser sentence, creating room for argument that this provision permitted the kind of discrimination condemned by recent decisions of the United States Supreme Court.

The language of subsection (a)(2) has also been amended by Act 474 to make it clear that before a jury may return a death sentence it must find that aggravating circumstances outweigh *all* mitigating circumstances.

1988 Supplementary Commentary to § 5-4-603

Act 474 of 1977 amended the introductory language of § 5-4-603(a) to require that a jury impose a sentence of death upon making all findings required to do so. See commentary to § 5-4-603. The trial judge does not act under the same mandate. The Arkansas Supreme Court has pointed out that "the trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it. . . . The trial court has the power, in its discretion to reduce a death sentence to life imprisonment, or to grant a new trial." *Collins v. State*, 261 Ark. 195, 206-07, 548 S.W. 2d 106, 113 (1977) (interpreting the pre-Code version of § 43-2301 (Repl. 1977) [§ 16-90-105]).

This discretionary authority was recently re-emphasized in *Clines v. State*, 280 Ark. 77, 84-85, 656 S.W. 2d 684, 687 (1983) (interpreting § 5-4-602 *et seq.*)

See AMCI 1509.

Harmless Error Review

Act 412 of 1987 amended § 5-4-603 to add new subsections (d) and (e). The amendments were apparently a response to cases such as *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), *cert. denied*, 459 U.S. 1042 (1982) in which the Arkansas Supreme Court held that where one of three aggravating circumstances found by a jury imposing a death penalty was erroneous, the Court would not conclude that the jury would have imposed the death penalty had it found that only two aggravating circumstances existed, even though the jury found no mitigating circumstances. The Court directed that the sentence be reduced to life imprisonment without parole unless the Attorney General requested a new trial. To the same effect is *Giles v. State*, 261 Ark. 413,

549 S.W.2d 479, *cert. denied*, 434 U.S. 894 (1977).

Subsequently, the United States Supreme Court decided *Zant v. Stephens*, 462 U.S. 862, 77 L. Ed. 2d 235 (1983). The Court held that a Georgia death sentence was not constitutionally invalid even though one of the three aggravating circumstances found to exist by the jury imposing the death penalty was subsequently invalidated. The Court rejected defendant's argument that his conviction should be set aside on the grounds relied upon by the Arkansas Court in *Williams*. In Georgia, the jury is not required by law to balance aggravating circumstances against mitigating circumstances. In rejecting defendant's contentions, the Court in *Zant* pointed out that reversal was not required on *Williams* grounds because the Arkansas statute required that the jury find at least one aggravating circumstance and weigh it against mitigating circumstances to determine whether the death penalty should be imposed. *Zant* at 873, 77 L. Ed. 2d at 247. The implication of *Zant* is that the *Williams* case was correctly decided since the Arkansas Supreme Court, on the record before it, was unable to determine whether the jury would have imposed the death penalty had it found that only two aggravating circumstances existed, since, regardless of whether mitigating circumstances existed, in order to impose the death penalty the jury had to conclude that aggravating circumstances not only existed but, fur-

ther, that they justified a sentence of death. See § 5-4-603(a)(3).

Shortly thereafter, *Barclay v. Florida*, 463 U.S. 939, 77 L. Ed. 2d 1134 (1983) was decided. The United States Supreme Court held that a death sentence was valid even though the trial judge imposing sentence erroneously considered improper aggravating circumstances. The conviction was saved because the Florida Supreme Court applied a harmless-error analysis, determined that the trial court properly found no mitigating circumstances, and found that the death sentence was supported by the remaining aggravating circumstances.

New subsections (d) and (e) are aimed at establishing a *Barclay*-type constitutionally adequate harmless error review procedure. They are not instructive on how the Arkansas Supreme Court is to reach the conclusion that a jury's decision would have been the same had the facts been other than the jury supposed. The Court could decide that aggravating circumstances remaining after additional circumstances have been invalidated would, in the abstract, justify a sentence of death in the sense that a jury verdict to this effect would be unassailable. But it is difficult to see how enactment of subsections (d) and (e) place the Court in a better position to speculate about what a jury would have done under different circumstances. See commentary to § 5-4-604, *Error as to Aggravating Circumstance: Harmless Error Review, infra*.

Original Commentary to § 5-4-604

Section 5-4-604 was extensively amended by Act 474 of 1977. What was Code section 5-4-604(1) has been redrafted and divided into two subsections to comply with the apparent intent of the General Assembly enacting the first version of this subsection, which was formerly found at Ark. Stat. Ann. § 41-4712 (Supp. 1973). The legislative intent underlying this first version was evidently deterrence of killings by incarcerated prisoners and escapees. The language of the 1973 Act read:

"(a) The capital felony was committed by a person under sentence of imprisonment."

The original Code version — § 43-1303(1) [5-4-604(1)] — read:

"(1) The capital murder was committed by a person subject to imprisonment, suspension, or probation as a result of being found guilty of a felony."

Viewed in retrospect, the original Code language was clearly too broad, as is apparent from the following hypothetical. A and B are found guilty of forgery. A gets three years' imprisonment, flattens the sentence, and is released. B gets five years' probation. Both commit capital murders four years from the date of the finding of guilt of forgery. Why should probationer B receive harsher treatment than A, who is not subject to any supervision — particularly since B's probation status may indicate mitigating circumstances not present in A's case?

Additionally, the original Code version of § 41-1303(1) [5-4-604(1)] was at cross-purposes with its companion subsection 41-1303(2) [5-4-604(2)] which read:

"(2) The defendant was previously convicted of another capital murder or of a felony involving the use or threat of violence to the person."

In other words, § 41-1303(1) [5-4-604(1)] permitted proof of conviction of a non-violent felony as an aggravating circumstance, while § 41-1303(2) [5-4-604(2)] was clearly intended to restrict proof of aggravating circumstances to convictions of felonies involving violence.

What was § 41-1303(2) [5-4-604(2)] appears in amended form as § 41-1303(3) [5-4-604(3)] and has been modified in two ways. First, the prosecution need no

longer prove that the defendant was previously *convicted* of another offense. The prosecution may establish an aggravating circumstance through proof that the defendant previously *committed* another specified type of offense. Second, in order to reach defendants who have previously committed crimes posing danger to the safety of persons but not involving "the use of threat or violence," the subsection has been amended to permit proof of an aggravating circumstance through proof of a crime that has an element "creating a substantial risk of death or serious physical injury to another person."

The remaining subsections, §§ 5-4-604(4)-(7), are virtual verbatim renditions of prior authority formerly found at § 41-4711 (Supp. 1973).

1988 Supplementary Commentary to § 5-4-604

Proof of Aggravating Circumstances

The aggravating circumstances defined by § 5-4-604(3) (commission of previous violent felony) may be proved by the uncorroborated testimony of an accomplice to the previous offense, the Court's reasoning being that the corroboration required by Ark. Stat. Ann. § 16-89-111 (Repl. 1977) prevents only *conviction* of an offense based upon such testimony, not proof that the defendant *committed* the offense for purposes of sentencing. *Clines v. State*, 280 Ark. 77, 91-92, 656 S.W.2d 684 (1983).

Aggravating Circumstances: Standard of Review

In order to impose the death penalty the jury must, among other things, return a finding under § 5-4-603(a)(1) that "aggravating circumstances exist beyond a reasonable doubt." See, *Miller v. State*, 280 Ark. 551, 660 S.W. 2d 163 (1983). In *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980) the Court stated:

We do not consider the jury's findings as separate little verdicts, and *we do not require the same degree of proof to sustain a jury finding that an aggravating or mitigating circumstance exists as we would require to sustain a conviction* if that circumstance was a separate crime.

Id. at 355, 605 S.W.2d at 439 (emphasis added).

The Court thus established a different, but unstated, standard of review to be met by the State on review in regard to aggravating circumstances. Though the language above does not explicitly state that the Court will sustain a conviction based upon an aggravating circumstance not supported by substantial evidence, the dissent so interpreted it, *Miller* at 358-A, 605 S.W.2d at 441, pointing out that any lesser standard failed to satisfy constitutional requirements:

I cannot accept the approach of the majority in its substituted opinion that somehow we should not require the same test for substantial evidence to sustain a jury finding of an aggravating circumstance. . . . The position taken by the majority to treat the jury's finding of the existence of an aggravating circumstance as something other than a "separate little verdict", which may be supported by evidence less than substantial, according to the usual tests, simply does not satisfy the requirements for a constitutionally imposed death penalty.

Id. at 358-A, 605 S.W.2d at 441. (Dissent of Fogleman, C.J.)

The dissent concluded that meaningful appellate review found to exist in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977) and *Neal v. State*, 261 Ark. 336, 548 S.W.2d 135, *cert. denied*, 434 U.S. 878 (1977) and re-

quired by United States Supreme Court decisions could not be conducted under the majority opinion in *Miller*.

Shortly thereafter, though, in *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), the Court used language that might be interpreted to have reinstated the "substantial evidence" standard of review when it found, in regard to a burglary conviction admitted for the jury's consideration, that "the jury had no *substantial basis* for finding this particular aggravating circumstance. . . ." *Williams*, *supra* at 12, 621 S.W.2d at 687 (emphasis added), citing *Miller*, *supra*. But in *Clines v. State*, 280 Ark. 77, 92, 656 S.W.2d 684, 691 (1983), affirming a conviction of capital murder, the court stated:

In *Miller v. State*, *supra*, we held that the same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. (*Miller* at p. 355). We said that if there was evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

Thus, in the sentencing phase it takes less evidence to get an issue to the jury. But see § 5-4-602(4). And on review the Supreme Court weighs such evidence using a standard requiring less probative value than the "substantial evidence" rule.

The most recent in the line of cases bearing on the standard of appellate review of evidence supporting aggravating or mitigating circumstances and the quantum of proof necessary to support admission of an aggravating or mitigating circumstance is *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983), where the prosecution attempted to show aggravating circumstances by proof that the defendant had *committed* (but was not *convicted* of) other violent offenses. In finding that the State had not met its burden of proof, the Court stated:

"So it is clear the State can proceed as it did in this case. But when it attempts to prove another unrelated crime, without having evidence of a conviction, it does so at some risk and the trial court must prevent prejudicial evidence from reaching the jury The jury in this case heard

evidence that merely amounted to an accusation that Miller had committed two other crimes — *not substantial evidence he did so*.

Id. at 554, 660 S.W.2d at 165.

Justice Hays, concurring, took exception to the language above quoted and pointed out that the Court has "said categorically that we do not require the same degree of proof that an aggravating or mitigating circumstance exists as would be required to sustain a conviction, and if there is any evidence of aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury." *Id.* at 559, 660 S.W.2d at 167-68, citing *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

Aggravating and Mitigating Circumstances: Submission to Jury

In *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980), the Court adopted the following procedure in regard to instructing the jury on aggravation and mitigation:

As the statute does not indicate otherwise, the circuit judges of the state have been submitting to the jury in capital murder cases all seven of the enumerated aggravating circumstances and all six of the enumerated mitigating circumstances, regardless of the inapplicability of some of them. Ark. Stat. Ann. § 41-1303 (Repl. 1977) [§ 5-4-604]. The practice was perhaps also bolstered by our Committee on Criminal Jury Instructions, because none of the aggravating or mitigating circumstances are bracketed in the model instruction, to indicate they might be omitted. We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter allow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury.

Id. at 354, 605 S.W.2d at 438.

Also, see AMCI 1509.

Error as to Aggravating Circumstance: Harmless Error Review

See supplementary commentary to § 5-

4-603 discussing statutory amendments that may supersede cases such as *Williams v. State*, *infra*, by resolving the invalid aggravating circumstance problem.

In *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), the Court reduced a death sentence to life imprisonment without parole because the trial court permitted the jury to consider a previous burglary conviction where there was no evidence that it involved violence or physical injury as required by § 5-4-604. Moreover, though the jury found three aggravating circumstances — one being based upon the burglary conviction — and no mitigating ones, the Court was unwilling to speculate about what the jury might have done had it found only two aggravating circumstances, since under § 5-4-603(a)(3) the jury must find that the aggravating circumstances “justify a sentence of death beyond a reasonable doubt.” But see *Henderson v. State*, 281 Ark. 406, 664 S.W.2d 451 (1984), where the Court dismissed a petition under Ark. P. Crim. P. 37, stating:

We do not find that counsel was ineffective in failing to raise the issue of petitioner's mental state in 1963. Even if the two robbery convictions were obtained while petitioner was suffering from psychosis, *the failure of an aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported by other proof of aggravating circumstances.* See *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed. 2d 235 (1983).

281 Ark. at 410, 664 S.W.2d at 454.

Williams, *supra*, must also be read in conjunction with *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, *cert. denied*, — U.S. —, 103 S. Ct. 389 (1982), where the trial court allowed into evidence during the penalty phase of the trial proof of convictions of larceny, burglary, and receiving stolen property. This was found not to be prejudicial error because the jury found neither that appellant had committed prior felonies involving violence or the risk of injury as an aggravating circumstance nor that he had no significant history of prior criminal activity as a mitigating circumstance. Also, because it was undisputed that at the time the crime was committed appel-

lant had escaped from prison where he was serving sentences for felony convictions, the Court, relying upon *Miller, supra*, found that the trial court should have omitted in its instructions on mitigation the circumstances relating to lack of prior criminal history, thus obviating the State's contention that admission of the improper felony convictions was necessary in anticipation of an effort by defendant to show a lack of such history in mitigation.

Justices Marshall and Brennan dissented from the United States Supreme Court's denial of certiorari, observing that “the State's use of petitioner's criminal record injected an extraneous factor into the capital sentencing proceeding.” *Ford v. Arkansas*, — U.S. —, 103 S. Ct. 389 (1982). The justices went on to “reject this cavalier use of the harmless error doctrine,” *Id.* at —, 103 S. Ct. at 390, and found that “there is certainly no basis for concluding beyond a reasonable doubt that the jury would have sentenced petitioner to death had it not been informed of his prior convictions.” *Id.* at —, 103 S. Ct. at 390.

When the defendant is charged with being an habitual offender and evidence relating to both violent and non-violent felonies is introduced in the sentencing phase of the trial, the trial court must clearly instruct the jury that only the offenses qualifying under § 5-4-604(2) may be considered in determining whether aggravating circumstances exist. *Hill v. State*, 275 Ark. 71, 87-88, 628 S.W.2d 285, 292, *cert. denied*, 459 U.S. 882 (1982), *A.R.Cr. P. Rule 37 petition denied*, 278 Ark. 194, 644 S.W.2d 282 (1983).

What Constitutes Felony Involving Violence: Proof Required

In *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983), evidence of convictions of first degree robbery and robbery with a firearm were admitted as aggravating circumstances. Appellant argued that this was error since the State offered no proof showing that the crimes involved a threat or risk of violence. The Court rejected this argument thusly:

There is no requirement that the State try the prior felony convictions a second time or that it present evidence that an out-of-state conviction for robbery had as an element the use

or threat of violence. Furthermore, inherent in the definition of robbery is a threat of violence.

278 Ark. at 200-01, 644 S.W.2d at 285.

It also appears that the language of § 5-4-604(3) has been expansively construed by the Court to include felonies *actually* involving the use or threat of violence. *Williams v. State*, 274 Ark. 9, 621 S.W. 2d 686 (1981); *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, *cert. denied*, — U.S. —, 103 S. Ct. 389 (1982). The phrase “an element of which” (§ 5-4-604(3)) has not been interpreted by the Court to require proof of an “element” as defined by § 5-1-102(5).

“Especially Cruel” Murder

Subsection (8), a provision common among death penalty statutes, was added by Act 833 of 1985. It was struck down on grounds of vagueness and overbreadth in the first case to construe it, *Wilson v. State*, 295 Ark. 682, — S.W.2d — (1988). The Court held that subsection (8) did not provide a clear standard for distinguishing between “ordinary” capital murders and “especially cruel” ones.

Aggravating Circumstances: Prior Felony Involving Violence: Time and Place Restrictions

In *Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986) the Arkansas Supreme Court held that the State could prove as aggravating circumstances under § 41-1303(3) [§ 5-4-604(3)] that a defendant committed “crimes not connected in time or place to the killing for which the defendant has just been convicted,” 289 Ark. at 396, 713 S.W.2d at 237, to satisfy the “previously committed” language of subsection (3). The Court went on to say that:

In this case the crimes used to prove an aggravating circumstance *involve other victims in another place and previously in time*. Therefore, they were properly used as an aggravated circumstance.

Id. at 396, 713 S.W.2d at 237.

In *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987), the proof showed that appellant shot at Cindy Warren moments before he entered the house of James and Sandra Warren and killed them. The trial court permitted the State to show the shooting involving Cindy Warren as an

aggravating circumstance under subsection (3). The Arkansas Supreme Court reversed, holding that “the shooting at Cindy Warren was so closely connected in both time and place that it did not present a portrait of the defendant as having previously demonstrated a character for violent crimes or a history for committing such crimes.” *Parker* at 428, 731 S.W.2d at 759. Justice Glaze, joined by Justice Hays, dissented, observing that the Court’s restrictive reading of subsection (3) to apply “to crimes not connected in time or place to the killing for which defendant has just been convicted ... engrafts a restriction of the employment of section (3) that simply is not there.” *Parker* at 438, 731 S.W.2d at 765. From a constitutional law standpoint, though not necessarily from a statutory construction standpoint, the dissent’s position has merit, for the function of aggravating circumstance findings is to “genuinely narrow the class of persons eligible for the death penalty and ... reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Lowenfield v. Phelps*, 484 U.S. —, 98 L. Ed. 2d 568, 581 (1988). Proving the Cindy Warren incident would arguably perform this narrowing function.

Aggravating Circumstance Duplicating Element of Offense

In 1985 the Eighth Circuit Court of Appeals held that the “pecuniary gain” aggravating circumstance (§ 5-4-604(3)) could not be used to impose the death penalty in cases where it would duplicate an element of the underlying offense. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, — U.S. —, 88 L. Ed. 2d 475 (1985) (use of aggravating circumstance duplicating element of crime underlying capital murder conviction violates Eighth Amendment to Federal Constitution in capital case by failing to genuinely narrow class of persons eligible for death penalty). To the same effect are *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986); *Ruiz v. Lockhart*, 806 F.2d 158 (8th Cir. 1986). Subsequently, however, in *Lowenfield v. Phelps*, 484 U.S. —, 98 L. Ed. 2d 568 (1988), the United States Supreme Court held that while “a capital-sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the

imposition of a more severe sentence on the defendant compared to others found guilty of murder," 484 U.S. at —, 98 L. Ed. 2d at 581, the narrowing function may be performed by jury findings at either the sentencing phase or the guilt phase of the trial. Therefore, the fact that an aggravating circumstance ("the offender knowingly created a risk of death or great bodily

harm to more than one person)" 484 U.S. at —, 98 L. Ed. 2d at 581) duplicated one of the elements of the crime in question ("a specific intent to kill or to inflict great bodily harm upon more than one person") 484 U.S. at —, 98 L. Ed. 2d at 581 did not make the death sentence constitutionally infirm in *Lowenfield*.

Original Commentary to § 5-4-605

Section 5-4-605 restates the mitigating circumstances previously found in former law previously codified as Ark. Stat. Ann. § 41-4712 (Supp. 1973). The introductory clause has been altered slightly to clearly indicate that the section does not contain an exhaustive list of mitigating circumstances. A comparison of the introductory clauses of former §§ 41-4711, 4712 sug-

gests that the legislature probably intended a similar construction of the latter provision. ("Aggravating circumstances shall be limited to the following" versus "Mitigating circumstances shall be the following.") Subsection (6) states a circumstance not presently enumerated. It is taken from M.P.C. § 210.6(4)(a).

1988 Supplementary Commentary to § 5-4-605

Evidence of Mitigating Circumstances

Section 5-4-602(4) provides that any party may present evidence of a mitigating circumstance "regardless of its admissibility" under the rules of evidence. The Court has not construed this statutory language literally:

However, This statute (§ 41-1301(4)) [5-4-602(4)] was not designed to create a vehicle for intentional circumvention of the rules of evidence. The rules of evidence should be followed when possible. In this case the witness was available to testify and there was no reason for the admission of this hearsay testimony.

Hill v. State, 275 Ark. 71, 86, 628 S.W.2d 284, 291, cert. denied, 459 U.S. 882 (1982). Compare, *Hobbs v. State*, 273 Ark. 125, 617 S.W.2d 347 (1981), where the Court upheld exclusion of unsworn videotape evidence, stating:

While evidence offered in mitigation should not be refused simply because it would not be admissible in a trial, that does not mean that it does not have to have some relevant or probative value regarding mitigation. *The statute tends to relax the requirements of admissibility. That relaxation would go to perhaps authenticity or in the case of testimony, perhaps hearsay, either of which might prevent*

admissibility in a trial. That does not mean that the General Assembly intended to totally open the door to any and all matters simply because mitigation is the issue. Testimony that is offered should be sworn and the State should be given an opportunity to cross examine unless there are compelling and valid reasons for not meeting those requirements.

Id. at 140, 617 S.W.2d at 354 (Court's emphasis and emphasis added).

Reading *Hobbs* and *Hill* together, hearsay testimony about statements made by an unavailable witness may be admissible, and its exclusion, error.

In addition, see *Titus v. State*, 268 Ark. 9, 593 S.W.2d 164 (1980), where the Court found no error in the trial court's refusal to admit in the guilt phase of trial evidence in the form of lay testimony about defendant's mental problems. The evidence was offered in "mitigation." While finding no error because no proffer was made and because the jury convicted defendant only of first degree murder, the Court hinted that the evidence might have been admissible had the trial proceeded to a penalty phase, opining that "the strict rules of evidence would not have governed in the sentencing phase of the trial..." *Id.* at 13, 593 S.W.2d at 166. See, also, *Hendrickson v. State*, 285 Ark. 462, 466, 688 S.W.2d 295, 297 (1985).

Findings of Mitigating Circumstances — Instructions and Verdict Forms Under AMCI

Because § 5-4-603 does not require that mitigating circumstances may be considered only if unanimously found to exist beyond a reasonable doubt, AMCI 1509 is specially tailored to disclose, when considered with AMCI Form 2, unanimity and the probative force of evidence adduced in mitigation. The instruction reads in pertinent part:

If you do unanimously find one or more aggravating circumstances, you should then complete Form 2, which deals with mitigating circumstances. Form 2 lists some factors that you may consider as mitigating circumstances. However, you are not limited to this list. You may, in your discretion, find other mitigating circumstances.

Unlike an aggravating circumstance, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably existed.

Form 2 is made up of four parts. Part A is a list of mitigating circumstances to be checked only if you unanimously agree that a particular circumstance existed. Part B is a list to be checked where some of you think a circumstance existed, but all do not agree. Part C is a list to reflect circumstances of which there may have been some evidence but no member of the jury feels that the circumstances existed. The last part D is to be checked only if the jury concludes that there is no evidence of mitigating circumstances.

The findings pursuant to this instruction permit the Court to compare sentences imposed in capital cases.

Findings Regarding Aggravation and Mitigation: No Res Judicata or Collateral Estoppel Effect

In *Bly v. State*, 263 Ark. 138, 562 S.W.2d 605 (1978) the Court reversed a conviction of capital murder because the jury's sen-

tencing phase findings were inconsistent with its finding of guilt. Proof of robbery was necessary as the basis of the capital murder conviction. The Court found that there was no substantial evidence to show that appellant committed robbery. It went on to observe that on the issues of aggravation and mitigation the jury found that the murder was committed by someone other than appellant, that the murder was not committed for pecuniary gain, and that the murder was not committed for the purpose of avoiding or preventing arrest or to escape from custody. These findings were inconsistent with the finding that appellant had committed capital murder. For this reason and because of the insufficient evidence of robbery, the Court reversed the conviction.

On retrial, collateral estoppel was raised as a defense, with appellant arguing that the previous jury's finding that appellant did not kill the victim barred the subsequent prosecution for first degree murder. In *Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980) the Supreme Court reviewed appellant's subsequent conviction for first degree murder and, relying on § 5-1-113, found that appellant had not been previously acquitted of first degree murder by virtue of his conviction of the greater inclusive offense of capital murder. The Court went on to point out that the elements of the two offenses were different and that the previous jury's findings as to mitigation had no bearing on appellant's guilt of the subsequently charged different offense.

Admissibility as Mitigation Evidence, of Proof of Conduct After Conviction of Capital Felony

A convicted capital felon is entitled to introduce mitigation evidence of events happening after the date of the offense and, where a new trial is necessitated because of an appellate court ruling, between the date defendant is convicted at the first trial and the date of his subsequent trial. *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987), relying upon *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986).

Original Commentary to § 5-4-606

Section 5-4-606 is essentially old Ark. Stat. Ann. § 41-4707 (Supp. 1973).

Original Commentary to § 5-4-607

This section is taken from former authority previously codified as Ark. Stat. Ann. § 41-4714 (Supp. 1973). The procedures for granting pardons or commutations have not been changed. Prior law applied the same procedures to reprieves. This was unduly restrictive since a reprieve is only a postponement of execution and must often be granted on short notice. Accordingly, under the Code reprieves are

governed by the pre-Act 438 body of case and decisional law on the subject. See, e.g., Ark. Stat. Ann. §§ 43-2617, 43-2621, 43-2622 (Repl. 1964); § 43-2811 (Supp. 1973).

Subsections (b) and (c) were added by Act 474 of 1977 and are patterned after former authority previously codified as §§ 41-4715, 4716 (Supp. 1973).

Original Commentary to § 5-4-608

The earlier counterpart of § 5-4-608, former Ark. Stat. Ann. § 43-2108.2 (Supp. 1973), was enacted in 1971 before the legislature drew the distinction between the sentences of "life imprisonment" and "life imprisonment without parole." If interpreted literally, § 43-2108.2 appeared to provide that life imprisonment was the maximum sentence that could be imposed for a capital offense when the death penalty was waived. Section 5-4-608 authorizes the prosecutor to waive the death penalty and still seek conviction of a cap-

ital offense with the resulting mandatory sentence of life imprisonment without parole. See, also, Commentary to § 5-4-602, *supra*.

It should be noted that the original Code language was amended by Act 474 of 1977. As modified, § 5-4-608 explicitly provides for sentencing following a guilty plea to a capital felony charge. Former law on the subject was ambiguous. See former § 5-4-608. See, also, §§ 43-2108 (Repl. 1964); 43-2108.1, 2108.2 (Supp. 1975); Ark. R. Crim. P. 24.4(e), 31.4 (1976).

1988 Supplementary Commentary to § 5-4-616

This section, codifying Act 546 of 1983, sets out procedures to be followed after remands arising out of sentencing errors in death cases. Most importantly, it explicitly approves resentencing by a different jury, while retaining the procedures required by §§ 5-4-602 to 5-4-605. Before enactment of Act 546, where a death sentence was vacated but the underlying con-

viction was upheld, on remand the prosecutor was apparently required to choose between retrying both guilt and sentencing issues or acquiescing in a sentence to life imprisonment without parole because of the "same jury" requirement of § 5-4-602. See Section 3 of Act 546, the emergency clause.

1988 Supplementary Commentary to § 5-5-101

Henry v. State, 280 Ark. 24, 655 S.W.2d 372 (1983) answered in the negative the question whether all money possessed by persons engaging in illegal gambling is "possessed under circumstances prohibited by law" under § 5-5-101(b)(1) and is subject to seizure. The opinion also points

out but does not attempt to resolve problems arising when currency is claimed to be contraband: cash cannot be destroyed, and sale at public auction would merely result in money being exchanged for money.

Original Commentary to § 5-5-102

Pre-existing authority respecting disposition of seized goods was scattered throughout the statutes. See, e.g., Ark. Stat. Ann. §§ 41-1809, 41-2009 (Repl. 1964); 43-2327, 43-2901 et seq. (Repl. 1964); 47-411, 47-502, 47-523, 47-602 (Repl. 1964); 48-925 (Repl. 1964); 48-926 (Supp. 1973), 48-927 (Supp. 1973), 48-929 (Supp. 1973), 48-936 (Supp. 1973); 82-1014 (Supp. 1973), and 82-2105 (Supp. 1973).

Section 5-5-101 is not intended to supersede all pre-existing statutory authority. Rather, as is apparent from a reading of § 5-5-102, its purpose is to supplement present law. Where previously enacted ordinances or statutes provide for a particular means of disposition, the Code sections are inapplicable.

Section 5-5-101 provides that property seized by the police pursuant to arrest, search warrant, investigation, etc., must be returned to its rightful owner in every case except one — where contraband property is owned by a defendant. “Contraband” is defined by § 5-5-101(b) and encompasses, for example, prohibited weapons of the type enumerated in § 5-73-106. The term “contraband” at common law was restricted in meaning to “goods exported from or imported into a country against its laws.” Black’s Law Dictionary (4th Ed.) at 393. Section 5-5-101(b) provides a much more expansive definition to the end of making the subject of disposi-

tion susceptible of concise treatment in two sections. The definition of contraband has been expanded by Act 474 of 1977 to include a new subsection codified as § 5-5-101(b)(2).

As a result of the definition of § 5-5-101(b), for the purposes of restoration of property an article may be “contraband” with respect to one person but not to another. For instance, if A steals B’s automobile and uses it in a bank robbery, the car and the proceeds of the offense are contraband from the offender’s standpoint, but the respective owners of the automobile and the stolen funds are entitled to their return. On the other hand, under §§ 5-5-101(a) and 5-5-101(b)(1) unlawfully possessed drugs seized pursuant to the arrest of their owner-possessor will not be returned.

As a result of the Act 474 amendment referred to above, something lawfully owned by a defendant — again, for instance, a car — and used to commit an offense falls under the definition and becomes subject to forfeiture. Thus, as is readily apparent, § 5-5-101(b)(2) significantly increases the scope of § 5-5-101.

Subsection (c) mandates destruction of contraband articles not capable of lawful use. If the article is capable of such use subsection (c) refers the reader to subsections (e)-(g) which set out procedures for sale of property and disposition of monies thereby acquired.

1988 Supplementary Commentary to § 5-5-201

Act 238 of 1985 added §§ 5-5-201 to 204. These sections refine the § 5-5-101 definition of contraband and deal more explicitly with seizure and sale of conveyances as well as disposition of the sale proceeds.

The enumeration of subject offenses throughout does not include any degree of

homicide, battery, or assault. Also absent are references to kidnapping or sexual offenses. If §§ 5-5-201 to 204 are construed to supersede § 5-5-101 where conveyances are involved, an automobile used in a capital murder or a kidnapping is no longer subject to seizure under this chapter.

1988 Supplementary Commentary to § 5-5-202

Act 238 of 1985 added §§ 5-5-201 to 204. These sections refine the § 5-5-101 definition of contraband and deal more explicitly with seizure and sale of conveyances as well as disposition of the sale proceeds.

The enumeration of subject offenses throughout does not include any degree of homicide, battery, or assault. Also absent are references to kidnapping or sexual offenses. If §§ 5-5-201 to 204 are construed to supersede § 5-5-101 where con-

veyances are involved, an automobile used in a capital murder or a kidnapping

is no longer subject to seizure under this chapter.

1988 Supplementary Commentary to § 5-5-203

Act 238 of 1985 added §§ 5-5-201 to 204. These sections refine the § 5-5-101 definition of contraband and deal more explicitly with seizure and sale of conveyances as well as disposition of the sale proceeds.

The enumeration of subject offenses throughout does not include any degree of

homicide, battery, or assault. Also absent are references to kidnapping or sexual offenses. If §§ 5-5-201 to 204 are construed to supersede § 5-5-101 where conveyances are involved, an automobile used in a capital murder or a kidnapping is no longer subject to seizure under this chapter.

1988 Supplementary Commentary to § 5-5-204

Act 238 of 1985 added §§ 5-5-201 to 204. These sections refine the § 5-5-101 definition of contraband and deal more explicitly with seizure and sale of conveyances as well as disposition of the sale proceeds.

The enumeration of subject offenses throughout does not include any degree of

homicide, battery, or assault. Also absent are references to kidnapping or sexual offenses. If §§ 5-5-201 to 204 are construed to supersede § 5-5-101 where conveyances are involved, an automobile used in a capital murder or a kidnapping is no longer subject to seizure under this chapter.

Original Commentary to § 5-10-101

Chapter 10 is concerned with the most serious kinds of offenses against the person — those resulting in death.

At common law, all murder was a capital offense. In 1794, Pennsylvania introduced the novel concept of grading the offense by degree in order to differentiate capital from non-capital offenses. The vast majority of jurisdictions, including Arkansas, adopted this distinction, as does the Code. Such differentiation has not received universal approval. For instance, commentators on the subject have recently argued that degree discrimination has lost whatever utility it once had, chiefly due to judicial blurring of the concepts of "premeditation" and "deliberation," the bases of the distinction. The great weight of authority is to the effect that both may be accomplished or formed instantly, thus rendering illusory any distinction between the two degrees of murder. See, e.g., *Green v. State*, 51 Ark. 189, 10 S.W. 266 (1888). The Commission, however, felt that degree differentiation based on varying culpable mental states remains an efficacious approach, inasmuch as it permits courts, prosecutors, and juries to make findings with the maximum feasible amount of precision.

The 1973 Capital Felony Act has been incorporated into the Code via this chapter on homicide and chapter 4 on disposition of offenders. Consolidation of Act 438's substantive provisions with the various degrees of homicide is desirable as a logical and practical matter because all offenses defined by the Act except one involve homicides distinguished from other kinds of homicidal conduct only by manner of commission. The approach taken by the Commission will not preclude further legislative action imposing capital liability for other offenses. But the Commission felt that any such legislation should take the form of authorizing imposition of the death penalty in the statute defining the offense, not creating a separate body of law associating offenses having nothing in common except the punishment sanctioned for their commission. Note also that the unique sentencing provisions of the Capital Felony Act have been relocated and now appear, substantially in the form in which they were originally enacted, in subchapter 6 of chapter 4 (Disposition of Offenders) together with the provisions relating to parole, appellate review, commutations, pardons, and reprieves.

The initial provision of this subchapter carries forward much of the original language of the former capital felony act. Section 5-10-101(a)(1), the felony murder provision, is the counterpart of former Ark. Stat. Ann. § 41-4702(A) (Supp. 1973), which provided:

"The following crimes shall be capital felonies punishable as provided in Section 41-4706 hereof:

"(A) the unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, or mass transit piracy."

Under the Code, exposure to capital punishment arises under specifically designated conditions pursuant to § 5-10-101(a)(1). First, the death of a person must occur not only generally in the context of the commission or attempted commission of one of the enumerated felonies, but the killing must take place "in the course of and in furtherance of the felony, or in immediate flight therefrom." The language "immediate flight" is intended to put to rest arguments turning on when the actual commission of the felony ceases and mere avoidance of apprehension commences.

Second, the killing must be done under "circumstances manifesting extreme indifference to the value of human life." The "extreme indifference" language makes it clear that proof of an inadvertent killing in the course of a felony will not suffice to establish liability under § 5-10-101(a)(1). Nor, as will be pointed out *infra*, will it support a conviction of first degree murder. In the absence of this language, a conviction entailing punishment by death could be based on conduct that would otherwise support at most only a conviction of manslaughter or even negligent homicide — for example, where the actor, in making his escape, negligently causes the death of another in an automobile accident occurring several blocks away from the scene of the crime. The Code formulation resulted from an examination of considerations going to the heart of the felony murder rule itself:

"At common law, the 'malice' necessary for murder could be found from the fact that the offender was engaged in robbery, rape, burglary, arson, or other common law felony. The effect of the felony-murder

rule was to permit capital punishment for certain unintended and even quite accidental killings in the commission of crimes which of themselves entailed considerable risk of physical violence. Since the common law felonies were themselves subject to capital punishment, the impact of the common law felony-murder rule was not great. As the death penalty for these other felonies was eliminated, the question arose why a miscreant who engaged in a non-capital offense should be subject to capital punishment for a death in respect to which he had no culpability or only such culpability as would ordinarily lead to manslaughter rather than murder liability." Vol. II, Working Papers, at 825.

To summarize, § 5-10-101(a)(1) finds the Code adopting a middle ground. Felony murder liability entailing exposure to capital punishment is retained, even though this will in some circumstances result in capital liability for conduct that, absent commission in a felony context, would as a rule be punishable only as second degree murder.

Section 5-10-101 permits imposition of capital punishment upon accomplices — that is, a defendant may receive a death sentence as a result of conduct of another party to the crime. Accomplice liability of this nature is, however, subject to restrictions imposed via the affirmative defense provided by subsection (b), which permits an accomplice to escape capital liability by proving by a preponderance of the evidence that he did not commit the killing or directly facilitate the homicidal act. In other words, an accomplice in the underlying felony is not also an accomplice to capital murder unless he solicits, commands, induces, procures, counsels or aids its commission. A somewhat similar affirmative defense is available to the accomplice charged under § 5-10-102. A discussion of this provision is found in the commentary to § 5-10-102, *infra*.

Subsection 5-10-101(a)(3) is virtually a verbatim restatement of former § 41-4702(C) which was directed at:

"The unlawful killing of a policeman or any other law enforcement officer, jailer, prison guard or any other prison official, fireman, a judge or other court official, probation officer, parole officer, military personnel, when any such person so killed is acting in the line of duty, and when such

killing is perpetrated from a premeditated design to effect the death of the person killed or of any other human being.”

Section 41-4702(C) [Supp. 1973] was probably drafted with the intent to require a specific purpose to kill, although the mental culpability state set out was a “premeditated design.” The language of § 5-10-101(a)(3) has made this implicit requirement explicit by drawing from the terminology of former law to require proof of “deliberation” as well as “purpose” to effect death.

Section 5-10-101(a)(3) also provides for somewhat broader coverage than did prior law. It will be noted that both § 5-10-101(a)(3) and former § 41-4702(C) impose liability by virtue of the “transferred intent” theory. Presumably, the draftsmen of former § 41-4702(C) proceeded on the theory that it is a particularly heinous crime to kill a person belonging to one of the enumerated classes. Section 5-10-101(a)(3) was rephrased to give maximum effect to the transferred intent theory by allowing imposition of capital punishment when *any* person is killed by an actor whose purpose is to cause the death of a member of a designated class. As previous § 41-4702(C) read, the converse was the case — that is, such punishment was permitted only where the actor’s purpose was to kill any person and his conduct, perhaps fortuitously, resulted in the death of a member of one of the enumerated classes. The Code formulation is more likely to produce the deterrent effect originally sought to be accomplished by former § 41-4702(C).

Subsection 5-10-101(a)(4) is the counterpart of previous § 41-4702(D) [Supp. 1973] which it has modified to some extent. Section 41-4702(D) prohibited the following conduct:

“(D) The unlawful killing of two (2) or more human beings when perpetrated from a premeditated design in the course of the same act to effect the death of the persons killed or any other human being.”

Strictly construed, former § 41-4702(D) would not have encompassed the killing of two or more persons by successive gunshots, because the statute required that the killings be accomplished by “*the same act*.” Additionally, the old formulation appeared to require that the actor engage in the proscribed conduct having the same culpable mental state with re-

spect to the killing of each victim. As a result, the earlier language might have been interpreted as not applicable to the following situation. A shoots into a crowd with the premeditated design to kill B and, as a result, kills both B and C. Since A did not intend to kill C, the criminal transaction might have been held not to fall within the purview of former § 41-4702(D).

Section 5-10-101(a)(4) replaces the language “design” with “purpose,” the term of art used throughout the Code. It further alleviates problems pointed out above by gearing liability to a premeditated and deliberated purpose to kill “any person” resulting in the death of “two or more persons” in the “course of the same criminal episode.”

Section 5-10-101(a)(5) is adapted from former § 41-4702(E) [Supp. 1973] which proscribed:

“(E) the unlawful killing of any public official or any candidate for public office from a premeditated design to effect the death of the person killed or of any other human being.”

Again, minor shortcomings in the former law were remedied by slight revision. The language of § 5-10-101(a)(5) makes manifest the subsection’s application to any person actually holding public office, regardless of whether he was elected, or appointed to fill a vacancy. As is the case with § 5-10-101(a)(3) and its predecessor, § 41-4702(C), both § 5-10-101(a)(5) and previous § 41-4702(E) impose liability via the “transferred intent” doctrine. As was done with § 5-10-101(a)(3), the language of prior § 41-4702(E) has been adjusted to create liability based on whom the actor seeks to kill, not whom he actually kills.

Subsection 5-10-101(a)(6) deals with the subject addressed by former § 41-4702(F) [Supp. 1973]: “(F) the unlawful killing of any person by a person who is already under sentence of death or of life in the penitentiary.”

Section 41-4702(F) grounded liability on “unlawful killing.” In so doing, it was clearly overbroad, since it would have permitted imposition of capital punishment for what would otherwise have been negligent homicide, a misdemeanor. For example, the old wording encompassed a situation where an inmate negligently op-

erated some type of machinery with the result that a fellow inmate was killed.

On the other hand, § 5-10-101(a)(6) requires purposeful conduct attended by premeditation and deliberation. It also makes allowances for the recently devised sentence of life imprisonment without parole.

Subsections (7) and (8), punishing the parties to a contract murder, are new.

Similar provisions are found in a number of recently enacted statutes of other jurisdictions.

Subsection 5-10-101(c) sets out the punishment to be imposed upon conviction and refers the reader to subchapter 6, dealing with the special trial and sentencing procedures that must be adhered to in a prosecution under § 5-10-101.

1988 Supplementary Commentary to § 5-10-101

Instructions

See AMCI 1501 *et seq.*

Amendments

Act 341 of 1981 broadens the scope of § 5-10-101(a)(5) by creating capital murder liability for causing the death of an appointed "public office" holder.

Act 242 of 1987 added subsection (a)(2) punishing as capital murder a death caused by arson. Arson is defined at § 5-38-301 (Supp. 1987).

Meaning of "In the Course of and in Furtherance of"

For recent developments on what constitutes conduct "in furtherance of the felony" underlying the murder alleged, see commentary to § 5-10-102.

Double Jeopardy

Double jeopardy questions frequently arise in circumstances where defendants are charged not only with capital murder or attempted capital felony murder, but also with other substantive offenses. See, e.g., *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982).

For a thorough discussion of recent decisions see the supplementary commentary to § 5-1-110.

Overlapping Scope of §§ 5-10-101 and 5-10-102

Though §§ 5-10-101(a)(1) and 5-10-102(a)(1) define capital murder and first degree murder in a way permitting an accused to be charged under either for the same conduct, they are not on that account unconstitutionally vague. *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980). In fact, this statutory scheme may inure to the benefit of an accused. Where a defendant is charged under § 5-10-101 on

facts permitting a conviction under § 5-10-102, "the jury may refuse consideration of the death penalty by returning a guilty verdict as to the charge of murder in the first degree. . . ." *Wilson v. State*, 271 Ark. 682, 686, 611 S.W.2d 739, 741 (1981).

The § 5-10-102(a)(1) reference to "a felony" does not limit prosecutions under this section to those based upon felonies other than the seven enumerated in § 5-10-101(a)(1). *Cromwell, supra*.

Capital Felony Murder: Aggravated Robbery as Basis for Conviction

Though § 5-10-101(a)(1) lists robbery, not aggravated robbery, as an offense on which a charge of capital murder can be predicated, it is clear that aggravated robbery can be the basis for a capital murder charge. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981).

Prior to the United States Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. ___, 98 L. Ed. 2d 568 (1988) the Eighth Circuit Court of Appeals had held that the aggravating circumstance of pecuniary gain could not be used in capital felony murder cases where the underlying offense was robbery, since the gist of aggravated robbery is itself pecuniary gain and, thus, impermissible "double counting" not narrowing the class of candidates for the death penalty would take place. *Lowenfield* overruled these cases and approved "double counting." For commentary on this and other sentencing issues, see the supplementary commentary to Ark. Code Ann. §§ 5-4-601 to 608.

Premeditation and Deliberation

As indicated in the original commentary and under pre-Code case law, premeditation and deliberation may be formed instantly. Also, as noted in the original commentary, the distinction between the two

tends to become blurred. The distinction sometimes vanishes. For example, in *Ford v. State*, 276 Ark. 98, 108, 633 S.W.2d 3, 9, *cert. denied*, — U.S. — (1982), the Court stated: "The matter of premeditation and deliberation, absent a confession, can only be proven by circumstantial evidence. *This state of mind* may be formed on the spur of a moment." (Emphasis added.)

Referring to pre-Code cases and the original commentary to § 5-10-101, the Court has held that premeditation and deliberation still need not exist for any particular length of time. *Fields v. State*, 280 Ark. 153, 655 S.W.2d 419 (1983) (holding that AMCI 1507 accurately states the law).

Pleas of Guilty

A defendant is not entitled to enter a guilty plea to capital felony murder except according to the terms of Ark. R. Cr. P. 31.4. See, also, Ark. R. Cr. P. 31.1.

Discretionary Charging Authority

The Court held in *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980) that §§ 5-10-101 and 5-10-102 do not confer upon the prosecutor or grand jury arbitrary power in charging a defendant to select between capital murder and first degree murder. It should be noted, however, that the discretionary charging authority conferred by this statutory scheme is not unlimited. The Court merely found that "there can be no constitutional objection to the exercise of a *reasonable discretion* in (charging)." *Id.* at 107, 598 S.W.2d at 734. (Emphasis added.) In *Miller v. State*, 269 Ark. 341, 352, 605 S.W.2d 430, 437 (1980), quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), the Court said:

Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was (not) deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."

See, also, *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983).

Cruel and Unusual Punishment

In *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), the Arkansas Supreme

Court discussed *Enmund v. Florida*, 458 U.S. 782 (1982) which held that under the Eighth Amendment to the Federal Constitution a death sentence is cruel and unusual punishment if imposed on an accomplice to a robbery resulting in the death of the victim where the accomplice intended no killing, was not present when it occurred, and did not contemplate the use of deadly force to accomplish the robbery. The Arkansas Court did not raise or dispose of the issue of whether § 5-10-101(b) provides affirmative defenses meeting the requirements of *Enmund*, *supra*, but merely noted that *Enmund* standards were not violated by the convictions at issue in *Clines*. Compare, *Henry v. State*, 278 Ark. 478, 647 S.W. 2d 419 (1983), where the Court reduced a death verdict to life imprisonment without parole on grounds that appellate was an accomplice and did not fire the fatal shots. But see *Pickens v. State*, 714 F.2d 1455 (8th Cir. 1983) (appellant not proving affirmative defense under § 5-10-101(b) not entitled to reduction on this basis) (reversed on other grounds).

Constitutionality of Affirmative Defenses Under § 5-10-101(b)

In *Moss v. State*, 280 Ark. 27, 655 S.W.2d 375 (1983), appellant argued that § 5-10-101(b) unconstitutionally shifts to the defendant the burden of proof in regard to the elements of the offense of capital murder. Appellant relied on *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In Re Winship*, 397 U.S. 358 (1970). The Court in *Moss* distinguished that case from *Mullaney* and *Winship* on grounds that under § 5-10-101(b) no elements of the offense must be disproved to establish the affirmative defense. The Court relied upon *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981) and *Patterson v. New York*, 432 U.S. 197 (1977), which defined with more precision the scope of the *Mullaney* holding and explicitly stated that *Mullaney* should not be read to discourage legislation providing affirmative defenses to felony murder prosecutions. See also, *Hobgood v. Housewright*, 698 F.2d 962 (8th Cir. 1983).

Review of Decisions

For a compendium of all death penalty cases reaching the Arkansas Supreme Court since 1977, see the concurring opin-

ion of Justice Hickman in *Ruiz v. State*, 280 Ark. 190, 655 S.W.2d 441 (1983).

A review of death penalty cases decided between 1983 and 1986 is found in Justice Hickman's concurring opinion in *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986), supplementing the history set out in *Ruiz v. State*.

Murder for Hire Under § 5-10-101(a)(8) — No Requirement for Exchange of Anything of Value

Orsini v. State, 281 Ark. 348, 665 S.W.2d 245 (1984) makes it clear that the prosecution need not show the actual exchange of something of value, but only an agreement to an "exchange," where one person hires another to kill the victim.

Corroboration of Accomplice Testimony: Corroboration of Each Element Not Required

In *Orsini v. State*, *supra*, appellant raised as an issue that the agreement contemplating murder was not corroborated by independent evidence. Ark. Stat. Ann. § 16-89-111 (Repl. 1977) states: "A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense." The Court held that "the statute only requires independent evidence connecting appellant with the crime; it does not require corroboration of each separate element of the crime." *Id.* at 360, 665 S.W.2d at 253.

See AMCI 1501 *et seq.*

Burglary as Underlying Felony for § 5-10-101 Murder Charge

In *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987), appellant was convicted of two counts of capital felony murder and sentenced to death. The conviction killings stemmed from the deaths of James and Sandra Warren charged to have been committed "in the course of and in furtherance of" a burglary under Ark. Stat. Ann. § 41-1501(1)(a) [§ 5-10-101(a)(1)]. The Arkansas Supreme Court held that appellant entered into the house to murder the Warrens, and, since the burglary was complete prior to their deaths, appellant did not cause the death of any person "in the course of and in furtherance of the felony." § 5-10-101(a)(1).

The Court distinguished *Blango v.*

United States, 373 A.2d 885 (D.C. 1977) and *People v. Miller*, 32 N.Y.2d 157, 297 N.E.2d 85 (1973). The Court in *Blango* stated that burglary was a continuing offense for purposes of the felony murder statute. In *Miller*, appellant was convicted of murdering someone who came to the aid of the first victim. Finding these cases distinguishable, the *Parker* majority held:

For the phrase "in the course of and in furtherance of the felony" to have any meaning, the burglary must have an independent objective which the murder facilitates. In this instance, the burglary and murder have the same objective. That objective, the intent to kill, is what makes the underlying act of entry into the home a burglary. The burglary was actually no more than one step toward the commission of the murder and was not to facilitate the murder.

Id. at 427, 731 S.W.2d at 759.

Justices Glaze and Hays dissented in an opinion by Justice Glaze pointing out that appellant entered the Warren house only to kill James Warren, there being no evidence that he intended to kill Sandra Warren or knew she was in the house when he entered it.

It is difficult to quarrel with the majority's reasoning, although sharpening the focus of inquiries into course and furtherance questions may restrict the ambit of the capital and first degree felony murder provisions. It should especially be noted that the course and furtherance language creates a conjunctive proof requirement. A killing that is indisputably in the course of a felony will not always meet the furtherance requirement.

The Court's reading of the "in the course of and in furtherance of the felony" language of the section is restrictive and raises questions about how the Court will rule when faced with circumstances in which, for example, the victim of a rape or robbery is killed after the underlying offense has clearly been consummated. In the case of a rape-based murder, must the Court find itself constrained to hold that "the [rape] must have an independent objective which the murder facilitates"? *Parker* at 427, 731 S.W.2d at 759. It is difficult to see how post-coital murder facilitates intercourse, so, in the absence of evidence that the murder following a rape was in "immediate flight," it may not

in all cases give rise to capital murder exposure. Compare, *Grigsby v. State*, 260 Ark. 499, 542 S.W.2d 275 (1976) (conviction under predecessor statute upheld on *res gestae* theory).

An example involving arson is *Cannon v. State*, 286 Ark. 242, 690 S.W.2d 725 (1985), decided before *Parker*. Appellant was convicted of capital murder on proof that he committed arson and killed the two children of the owner of the home he burned. The children were clearly killed inadvertently, appellant having no grudge against them, but intending instead to harm or kill their mother. The Court found substantial evidence to support the conviction but did not discuss how the deaths of the children were found to be "in the course of and in furtherance of the felony" of arson. One commits arson under Ark. Code Ann. § 5-38-301 if "he starts a fire or causes an explosion with the purpose of destroying ..." an occupiable structure. The offense of arson had long been

complete in *Cannon* before the deaths of the children.

Though it is not spelled out in *Parker*, the restrictive effect of that decision may come into play only in circumstances where the purpose to commit the homicide must be proved as an element of the underlying felony. In this event, *Parker* will only apply to capital murders committed during burglaries.

Parker has been followed in *Sellers v. State*, 295 Ark. 489, ___ S.W.2d ___ (1988) (murder in course of burglary).

*Capital Murder Under § 5-10-101(a)(1):
First Degree Murder Instruction Mandatory*

When capital murder is charged under § 5-10-101(a)(1), first degree felony murder (§ 5-10-102(a)(1)) is always a lesser included offense, and a first degree murder instruction must be given if requested. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Original Commentary to § 5-10-102

Section 5-10-102 essentially re-enacts prior law in a clarified form.

Section 5-10-102(a)(1) carries forward the felony murder doctrine. The Code provision differs from earlier law in that liability arises for a killing in the course of and in furtherance of *any* felony or in flight therefrom. The expansive effect of this change is circumscribed somewhat by the requirement that the death occur "under circumstances manifesting extreme indifference to the value of human life." Thus, the inadvertent killing during the course of a non-violent felony does not constitute first degree murder. Liability also arises for acts of accomplices, although a narrowly drawn affirmative defense to a charge grounded on accomplice conduct is provided by § 5-10-102(b).

Subsection 5-10-102(a)(2) identifies conduct which constitutes first degree murder regardless of concurrent felonious activity. The well established "specific intent" requirement of previous authority is satisfied by requiring "purposeful" conduct. Proof of "premeditation" and "deliberation," concepts deeply ingrained in prior law, is also required by the Code. Their retention was necessary to ensure that the Code offense comported with

prior law. In other words, requiring only proof of "purposeful" conduct would have changed prior law, because one can "purposely" kill another without "deliberation." See § 5-2-202.

Section 5-10-102(a)(2) also codifies the principle of "transferred intent" formerly read into the prior statute by court decisions. See, e.g., *Leonard v. State*, 251 Ark. 1090, 476 S.W.2d 807 (1972).

Subsection 5-10-102(b), as noted above, provides an affirmative defense to the defendant charged with first degree murder as a result of homicidal conduct of an accomplice during the commission of a felony. In providing this affirmative defense, the Code formulation is in accord with a substantial number of the recently proposed or enacted statutes. See, e.g., Proposed Michigan Code § 2005; Proposed Federal Code § 1601; Proposed Oregon Code § 88; Vern. Texas Code Ann. § 19.02 (Repl. 1974); S. 1400, 93d Cong., 1st Sess. § 1601 (1973); Proposed Colorado Code § 40-3-102; Proposed Vermont Code § 1503; Proposed Washington Code § 9A.32.020; and New York Penal Law § 125.25.

The effect of § 5-10-102(b) is to relieve the accomplice-defendant of homicide lia-

bility if he can prove, by a preponderance of the evidence, *each* of the four attendant circumstances set out at §§ 5-10-102(b)(1)-(4).

1988 Supplementary Commentary to § 5-10-102

Instructions

See AMCI 1502.

Amendments

Act 620 of 1981 elevates first degree murder to a Class Y felony. See §§ 5-1-106 and 5-4-401; AMCI 5001.

This section was amended by Act 52 of 1987 in an effort to overrule *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987) in which the Arkansas Supreme Court held that proof of premeditation and deliberation was necessary to prove first degree murder, even where the victim was the relatively helpless child of the accused. See supplementary commentary, *infra*.

Attempted First Degree Murder as Lesser Included Offense of Aggravated Robbery

In *Kinsey v. State*, 290 Ark. 4, 716 S.W.2d 188 (1986) the Arkansas Supreme Court indicated that in some cases attempted first degree murder could be established by proof of the same or less than all the elements required to establish aggravated robbery committed under § 5-12-103(a)(2) by inflicting or attempting to inflict death or serious injury. Under these circumstances, § 5-1-110(a)(1), (b)(1) would preclude conviction both of the robbery and the attempted murder. In other words, the Court equated the § 5-12-103(a)(2) language "inflicting or attempting to inflict death or serious physical injury upon another person" with the § 5-10-102(a)(1) language "attempting to cause the death of any person under circumstances manifesting extreme indifference to the value of human life."

See, also, supplementary commentary to § 5-1-110: *Multiple Convictions Based on Same Conduct*

Premeditation and Deliberation

In *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987), appellant was convicted of first degree murder after a trial at which it was shown that he physically abused and probably starved his eight year old son over a prolonged period of time before killing him. An autopsy showed that the victim had multiple

bruises and abrasions as well as internal hemorrhage due to blunt force trauma produced by blows from the fists of appellant, his 300 pound, six foot two inch tall father. The majority found that the State did not prove at trial that appellant had a premeditated and deliberated intent to kill his child and that the heinous nature of the crime alone did not compel the inference of premeditation. The Court then went on to find that the State had proved second degree murder and imposed a twenty year sentence. The Court overruled *Burnette v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985) in which it had permitted the inference of premeditation from the burning and beating of a child. Justice Hickman's stinging dissent was joined by Justices Hays and Glaze.

For over a century the rule in Arkansas has been that one is presumed to intend the natural and probable consequences of his acts. See *Howard v. State*, 34 Ark. 433 (1879). As a result of Midgett's abuse, his child died. The jury's finding that defendant intended to kill him seems supported by substantial evidence. In fact, the Court *did* find evidence of intent to cause serious physical injury in convicting appellant of second degree murder. 292 Ark. at 288, 729 S.W.2d at 415. The beatings were administered over a period of months, and Midgett had every opportunity to reflect upon his conduct. It therefore appears anomalous for the Court to conclude that the record did not disclose substantial evidence supporting the jury's finding that the defendant had occasion to premeditate and deliberate and, in fact, did so. Though one *could* conclude that Midgett wanted his child to recover and endure as a target of abuse, a reasonable jury could also draw the conclusion it in fact drew: that Midgett wished to kill his child and persisted until he was successful.

It is interesting to compare the standard of review employed by the Court in *Dix v. State*, 290 Ark. 28, 715 S.W.2d 879 (1986) with that employed in *Midgett v. State*.

In *Dix* the Court upheld the conviction of first degree murder based on evidence

indisputably showing a purpose to kill — the victim was beaten and strangled — but failing to prove either premeditation or deliberation. As scanty as the evidence of premeditation and deliberation may have been in *Midgett*, it was overwhelming compared to the *Dix* proof.

The latitude the Court customarily allows juries in inferring premeditation, deliberation, and a purpose to kill from circumstances surrounding a homicide is shown in *Harris v. State*, 291 Ark. 504, 726 S.W.2d 267 (1987), where the Court upheld a jury verdict of first degree murder. The victim was found dead in bed, having been killed with a single shot from a pistol. There was a bullet hole through the bed covers and there were powder burns around the hole. There were no powder burns on the deceased. Appellant testified that the gun discharged accidentally, but lab tests disclosed that this was unlikely. There was little, if any, other evidence on the issues of premeditation and deliberation.

In response to *Midgett*, the General Assembly enacted Act 52 of 1987 (1st Extraordinary Session) which now appears as § 5-10-102(3). Whether “cruel and malicious indifference” will be interpreted by the courts as different from “extreme indifference to the value of human life” remains to be seen. For instance, compare § 5-10-102(a)(3) (“cruel and malicious indifference”) with §§ 5-10-101(a)(1) (Supp. 1987); 5-10-102(a)(1); 5-13-201(a)(3); 5-13-201(a)(4)(A) (“extreme indifference”). That the General Assembly used both culpable mental states in the same statute, § 5-10-102 (Supp. 1987), may be construed to require proof of different facts.

Accomplice Liability: Evidence Supporting Conviction

In *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985), *overruled on other grounds*, *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987), the Arkansas Supreme Court once more addressed a case where an infant died of child abuse while in the custody of both parents. In affirming the first degree murder conviction of each parent the Court opined as follows:

The jury *could have* found that the lethal blow occurred on the morning of May 11 when both parents were with the child. The evidence supports

the conclusion that both parents could not have been ignorant of the abuse. They each had a duty to prevent such injury. [citing *Boone v. State*, *Limber v. State*, and *Deviney v. State*] In these cases we and the court of appeals affirmed both parents' liability for the death of their child when caused by a single blow to the abdomen.

Id. at 162, 697 S.W.2d at 98.

The Court went on to hold that premeditation and deliberation could be inferred from the nature of the child's injuries.

In *Midgett v. State*, the Court held that premeditation and deliberation could be inferred only where there was some rational basis for the inference and not simply because the crime was atrocious. It overruled *Burnett v. State* to the extent that *Burnett* was inconsistent with the latter rationale. Significantly, however, the Court did not indicate in *Midgett* that it had retreated from the position that a spouse may be found liable for criminal homicide in some degree of the death of a child based on *knowledge* of the injuries, even where the evidence permits the inference that only one person caused the injuries leading to death. See supplementary commentary to §§ 5-10-103 and 104.

Transferred Intent

In *Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987) appellant was convicted of first degree murder for killing Mary Davis in the midst of an argument with his girlfriend, Brenda Taylor. As recited by the Court, the evidence shows that a week before the shooting appellant told Taylor that he would “get her.” 291 Ark. at 141, 722 S.W.2d at 844. On the day of the killing, appellant saw Taylor at a service station and fired several shots at her as she drove away. He followed her to Davis's home and chased Taylor through the house. At some point Davis entered a room and told appellant to stop. He shot Davis, killing her. He then followed Taylor to another house and wounded her.

At trial, AMCI 1502 was used, the jury being instructed:

To sustain this charge, the State must prove the following things beyond a reasonable doubt; that with the premeditated and deliberated purpose of causing the death of another person, Harold Henderson caused the death of Mary Davis.

On appeal appellant argued that there was no evidence that he attempted to kill anyone other than Mary Davis and that therefore the reference to "another person" was incorrect. The Court ruled that "there was substantial evidence that Henderson intended to kill Brenda Taylor" and it upheld the instruction on this basis. *Id.* at 140-41, 722 S.W.2d at 844. This ruling is dubious. Appellant might have been appropriately convicted of first degree murder based upon his culpable mental state and conduct with reference to Mary Davis, but the evidence recited by the Court falls short of showing liability under the transferred intent provision, § 5-10-102(a)(2), creating murder liability where, for instance, one shoots at A with the culpable mental state that would support a murder conviction and instead kills B. Though it is reasonable to assume that Henderson intended to kill Taylor, the death of Davis was not caused by conduct directed toward Taylor but killing Davis by happenstance. Compare *Henley v. State*, 210 Ark. 759, 197 S.W.2d 468 (1946), where the defendant killed his wife while trying to shoot her paramour.

Collateral Estoppel

Bly v. State, 267 Ark. 613, 593 S.W.2d 450 (1980), interpreting § 5-1-113, holds that a verdict of guilt of capital murder, subsequently reversed on appeal because findings in the trial's sentencing phase were inconsistent with the verdict in the trial's guilt phase, is not a verdict of acquittal of first degree murder. See 1983 Supplementary Commentary to § 5-4-605.

Overlapping of §§ 5-10-101(a)(1) and 5-10-102(a)(1); Specification of Underlying Felony in Instruction on First Degree Murder as Lesser Included Offense

It is well established that §§ 5-10-101(a)(1) and 5-10-102(a)(1) are not unconstitutionally vague because they overlap in a way permitting a defendant to be charged under either for the same conduct. *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980). The § 5-10-102(a)(1) reference to "a felony" does not limit prosecutions to those based upon felonies other than those mentioned in § 5-10-101(a)(1). *Cromwell*, *supra*.

As regards instructing the jury on the lesser included offense of first degree murder in a prosecution for capital murder predicated upon a killing in the course of the commission of a felony, the felony must be specified in the first degree murder instruction as well as in the capital murder instruction. *Simpson v. State*, 274 Ark. 188, 623 S.W.2d 200 (1981).

Capital Murder Under § 5-10-101(a)(1): First Degree Murder Instruction Mandatory

When capital murder is charged under § 5-10-101(a)(1), first degree felony murder (§ 5-10-102(a)(1)) is always a lesser included offense, and a first degree murder instruction must be given if requested. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986).

Felony Murder

See *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987); supplementary commentary to § 5-10-101.

Original Commentary to § 5-10-103

Prior law defined murder as the unlawful, malicious killing of a human being. See prior authority previously found at Ark. Stat. Ann. § 41-2201 (Repl. 1964). See, also, *Wooten v. State*, 220 Ark. 750, 249 S.W.2d 964 (1952). Second degree murder was all murder other than first degree murder. See prior law formerly found at § 41-2206 (Repl. 1964). Consequently, second degree murder included all malicious killings other than those perpetrated during the commission of a violent felony or pursuant to a premeditated intent to kill.

This definition was deficient for several

reasons. One was the uncertain contours of the term "malice," which was statutorily defined as a deliberate intent to unlawfully take a life or a killing under circumstances manifesting "an abandoned and wicked disposition." See prior law previously codified as Ark. Stat. Ann. §§ 41-2203, 41-2204 (Repl. 1964). A more confusing shortcoming was the analytical process necessarily entailed by defining an offense in terms of what it was not. First, one had to determine whether the homicide constituted murder. If so, the conduct had to then be measured against the definition of first degree murder. If

found not to constitute the higher degree of homicide, the conduct was second degree murder.

Section 5-10-103 adopts a more comprehensible approach. Second degree murder is defined, like all other offenses, in terms of its constituent elements. "Malice" as a definitional term is discarded. However, the concept of malice is retained by defining the offense to require the same culpable mental states with respect to results and attendant circumstances that ordinarily suffice to show malice.

Subsection 5-10-103(a)(1) provides liability for purposely causing a death. It requires proof that the actor engaged in conduct the "conscious object" of which was to produce death. As was the case under old law, to sustain a conviction of second degree murder the proof need not show premeditation or deliberation respecting conduct or its consequences.

Section 5-10-103(a)(2) creates accountability for murder where the actor knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life. An actor "knowingly" causes a result when he engages in conduct with an awareness that "it is practically certain that his conduct will cause such a result." See, § 5-2-202(2). The requirement of "knowledge"

with regard to attendant circumstances manifesting extreme indifference is satisfied if the actor "is aware . . . that such circumstances exist." See, § 5-2-202(2).

Finally, guilt of second degree murder may be established under § 5-10-103(a)(3) if the actor engages in purposeful conduct not designed to kill but only intended to cause "serious physical injury" as that term is defined by § 5-1-102(19). If death results, murder has been committed. Subsection 5-10-103(a)(3) comports with prior authority. See, *McGaha v. State*, 216 Ark. 165, 224 S.W.2d 534 (1949).

As the preceding analysis indicates, the formulation of second degree murder defines an offense differing little, if at all, from previous law. In lieu of the vague requirement of "malice," purposeful or knowing conduct is required either with respect to death or serious physical injury. Knowing conduct is required regarding attendant circumstances. To the extent that the prior statutory requirement of a showing of malice meant that the proof had to show a general intention to do an unlawful and unjustifiable injury to another, § 5-10-103 codifies earlier law. See, *Jett v. State*, 151 Ark. 439, 236 S.W. 621 (1922).

1988 Supplementary Commentary to § 5-10-103

Amendments

Second degree murder has remained a Class B felony since enactment of the Code. See § 5-10-103(b). However, Act 620 of 1981 and Act 409 of 1983 amended § 5-4-104(c)-(d), which now reads:

(c) A defendant convicted of a Class Y felony or murder in the second degree shall be sentenced to a term of imprisonment in accordance with §§ 5-4-401 — 5-4-404.

(d) A defendant convicted of an offense other than a Class Y felony, capital murder, treason, or murder in the second degree may be sentenced to any one or more of the following, except as precluded by subsection (e) of this section below:

(a) imprisonment as authorized by §§ 5-4-401 — 5-4-404; or

(b) probation as authorized by §§ 5-4-301 — 5-4-311; or

(c) pay a fine as authorized by §§ 5-4-201 — 5-4-203; or

(d) make restitution; or

(e) imprisonment and to pay a fine.

(Emphasis added.)

Subsection (c) requires a sentence to imprisonment; subsection (d) permits a variety of dispositions for persons convicted of offenses other than second degree murder. Accordingly, read together as sensibly as possible, the subsections eliminate probation, fines, and restitution as sentencing alternatives for defendants convicted of second degree murder.

Evidence Supporting Conviction

Both the Supreme Court and the Court of Appeals have shown a willingness to impose liability based upon modest circumstantial evidence in homicide and battery cases involving child abuse. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1979)

contains language which could be read to suggest that accomplice liability might be based upon *knowledge* of circumstances constituting battery. See supplementary commentary to Ark. Stat. Ann. §§ 5-2-401 to 5-2-403.

The Court has also upheld the manslaughter conviction of appellant arising out of the death of her nineteen month old child without explicitly pointing out any evidence that appellant abused the victim herself, noting merely that appellant had seen her husband strike the victim and had argued with him about discipline. The Court went on to say that appellant's "complicity, according to the evidence, was more than an innocent bystander." *Limber v. State*, 264 Ark. 479, 488, 572 S.W.2d 402, 407 (1978). See also, supplementary commentary to § 5-10-104.

Appellant was convicted of the second degree murder of her four month old child in *Ward v. State*, 6 Ark. App. 349, 642 S.W.2d 328 (1982). Affirming the conviction, the Court of Appeals pointed out that in *Williams, supra*, the Court found that "there was no doubt that appellant could not have been around the child without knowing of her injuries." *Ward* at 353, 642 S.W.2d at 330. The *Ward* court also recapitulated the facts in *Limber, supra*, and quoted the "innocent bystander" language above.

Then, turning to the case at hand, the Court of Appeals stated:

It is obvious that a four-month old child is not mobile, and it is uncontradicted that he was in the custody and care of his parents from 8:00 p.m. Saturday until 2:00 p.m. Sunday. We do not distinguish between an accessory and a principal, Ark. Stat. Ann. § 41-301 et seq. (Repl. 1977), and there is no doubt that appellant could not have been around the child without *knowing of his injuries*. *Williams v. State, supra*. The Jury could properly infer that the parents were responsible for Todd's care and health during the period in which the injuries were sustained, and that the injuries were either inflicted by *one or both of them* or could be explained.

Ward at 353, 642 S.W.2d at 331.

Appellant's conviction was apparently upheld in *Ward* because she *knew* of the injuries and, though responsible for the child's health and safety, failed to offer a

plausible alternative version of their origin.

Moreover, the Court stated:

In the present case neither appellant nor her husband testified, but it was not unreasonable for the jury to find that *appellant could not have been completely ignorant* of any event which inflicted such violent blows to her son. The doctors' testimony established as conclusively as it is possible to do that the injuries were not self-inflicted or the result of a fall or other accident, and the only logical inference is that *one or both* of the parents inflicted the blows. (Emphasis added.)

Because circumstantial evidence must exclude every other reasonable hypothesis consistent with innocence, *id.* at 354, 642 S.W.2d at 329, the Court's acknowledgment that one permissible "logical inference" was guilt of another party, appellant's spouse, could be read as indicative of a relaxed standard of review in child abuse cases.

Ward, Williams and *Limber* may simply embody the Court's view that un rebutted evidence of abusive injuries to an infant victim in the care and presence of a parent is sufficient to support convictions of offenses requiring proof of reckless or knowing conduct or causing injury under circumstances manifesting extreme indifference to the value of human life. If so, the references to Ark. Stat. Ann. § 41-301 et seq. (Repl. 1977) [§§ 5-2-401 et seq.] create confusion because accomplice liability turns on *purposeful* conduct or causing a result with the culpable mental state required for the offense. Ark. Code Ann. § 5-2-403.

On the other hand, by adverting to parental "knowledge" the Court may be referring to § 5-2-403(a)(3) or (b)(3) (accomplice liability based upon legal duty to prevent "the commission of an offense" ((a)(3)) or "the conduct causing the result" ((b)(3)) accompanied by failure to make a proper effort to do so). If so, the reference is oblique: it is nowhere explicitly stated, though it is hinted at in *Boone v. State*, 282 Ark. 274, 277, 688 S.W.2d 17, 20 (1984) (second degree murder conviction): "The evidence supports a conclusion that appellant stood by and repeatedly exposed her son to beatings which resulted in his death. Appellant had legal custody of the

child and the duty to prevent such abuse." (*Emphasis added.*) Three justices dissented, asking, "Where is there other evidence that this woman knowingly killed her child . . . or that she was an accomplice to such a crime?" *Id.* at 280, 668 S.W.2d at 21.

In *Deviney v. State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985), the parents of a sixteen month old child were convicted of second degree murder under § 5-10-103(a)(1) or (2). The state adduced evidence showing that the child had recently sustained serious injuries incompatible with those normally produced by the fall testified to by defendants. The court observed that "appellants had exclusive custody and control of [the child]." *Id.* at 74, 685 S.W.2d at 181. It went on to find that the circumstantial evidence excluded every reasonable hypothesis other than defendants' knowingly or purposely causing the child's death. Compare *Deviney* with *Williams, Limber, Ward, and Boone, supra*.

See § 5-27-221, facilitating child abuse prosecutions by defining an offense in terms of reckless conduct of persons having care or custody of children.

In addition, see *Burnett v. State*, 287 Ark. 158, 679 S.W.2d 95 (1985), *overruled on other grounds*, *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987). And, see supplementary commentary to §§ 5-10-102 and 5-13-201.

Admissibility of Evidence Regarding Greater Inclusive Offense

In *Harris v. State*, 265 Ark. 517, 580 S.W.2d 453 (1979), the Court affirmed appellant's conviction of second degree murder, finding in the process that the state was entitled to adduce evidence rebutting a defense to a crime with which appellant was not charged, first degree murder. The State was permitted to show that appellant had threatened to kill his wife and had severely beaten her not only to show that the killing was done "know-

ingly," not "accidentally," but also because "the State is entitled to prove its case as conclusively as it can. . . . Relevant proof is not to be excluded merely because inferences going beyond the state's burden of proof might be drawn if the issues were different." *Id.* at 518-19, 580 S.W.2d at 455. Whether the evidence would have been admitted had it not also borne on the distinction between knowing and accidental conduct was not addressed by the Court.

Transferred Intent

Appellant in *Johnson v. State*, 270 Ark. 992, 606 S.W.2d 752 (1980) was convicted at trial of second degree murder under § 5-10-103(a)(2) arising out of the death of a bystander whom appellant shot while firing at his intended victim. The Court, three justices dissenting, reversed, holding that there was "no substantial evidence to justify concluding that appellant was aware that his conduct was *practically certain* to cause the death of a bystander or a death other than that of (his intended victim)." (Original emphasis.) *Id.* at 994, 606 S.W.2d at 754. See §§ 5-2-202(2); 5-10-103(a)(2). Implicit in this holding is that a charge of *knowing* conduct "under circumstances manifesting extreme indifference to the value of human life" (§ 5-10-103(a)(2)) does not allege "intentional" conduct which would call into play the doctrine of "transferred intent." (See, e.g., § 5-10-102(a)(2) and commentary thereto.) This is made clear in the last paragraph of the opinion:

We are not unmindful that had appellant been charged under a statutory provision in which his *intent to kill or seriously harm anyone* had been in issue, no challenge to the sufficiency of the evidence could have been sustained.

Id. at 995, 606 S.W.2d at 754. (*Emphasis added.*)

See AMCI 1503.

Original Commentary to § 5-10-104

Section 5-10-104 defines manslaughter. Pursuant to subsection (a)(1), conduct that would otherwise be murder is treated as manslaughter when certain mitigating circumstances are present. Former law, § 41-2208 (Repl. 1964), requiring that the killing take place upon a "sudden heat of

passion," has been modified for persuasive reasons succinctly stated below:

"Existing . . . law is, however, defective in several respects. The 'sudden quarrel or heat of passion' formula may have been adequate when all murder was punishable by death, but it is too loose in the

present day legal context. One who intentionally and coldbloodedly kills another with whom he is quarreling is a proper candidate for a murder conviction. 'Heat of passion' is an antique phrase misleading to a jury without qualifications about what caused the passion, which the courts have read into the statute. On the other hand, the judicially created rules need revision too. They too narrowly circumscribe the admissible provocations as follows:

"(a) Words, it is said, cannot constitute sufficient provocation. Thus racial slurs, sexual taunts, reflections on the chastity of women relatives and the like, are apparently excluded, regardless of the passion they arouse. . . . [See *Dow v. State*, 77 Ark. 464, 92 S.W. 28 (1906).]

"(d) Powerful but delayed reactions seem to be excluded by a requirement of impulsive and immediate response; thus the man who is put in a passion by 'brooding' over his affront is excluded from mitigation." [See, *Fitzpatrick v. State*, 37 Ark. 238 (1881); *Lindsey v. State*, 125 Ark. 542, 189 S.W. 163 (1916).] Working Papers at 828, 829 [citations added].

The Code formulation substitutes the language "extreme emotional disturbance" for the archaic common law term "heat of passion." As a result,

"[The Code] treat[s] on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. We also introduce a larger element of subjectivity in the appraisal, though it is only the actor's 'situation' and 'the circumstances as he believes them to be,' not his scheme of moral values, that are thus to be considered. *The ultimate test, however, is objective; there must be 'reasonable' explanation or excuse for the actor's disturbance.* This is, we think, to state in fair and realistic terms the criteria by which men do and should appraise the mitigating support of mental or emo-

tional distress when it is a factor in so grave a crime as homicide." *M.P.C. § 210.3, Comment at 41 (Tent. Draft No. 9, 1959)* [Emphasis added].

Subsection 5-10-104(a)(2) defines as manslaughter the purposeful causing or aiding of a suicide. One purpose of this section is to underscore the duty not to facilitate the commission of anti-social, although non-criminal, conduct. Another purpose is to make clear that, in the absence of deception or coercion on the part of the actor, such conduct is not to be considered first degree murder under § 5-10-102.

Section 5-10-104(a)(3) is in accord with common law and the prevailing weight of authority in imposing manslaughter accountability for reckless conduct. See, *M.P.C. § 201.3, Comment at 40 (Tent. Draft No. 9, 1959)*; and § 5-2-202(3). Former Arkansas law required that "the killing be in the prosecution of a lawful act, done without due caution and circumspection. . . [or] by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others. . . ." See prior law formerly found at Ark. Stat. Ann. § 41-2209 (Repl. 1964).

Section 5-10-104(a)(4) sets out an analogue to the former felony murder rule. Under this subsection, manslaughter liability is imposed if, during the commission or attempted commission of a felony, the death of any person is caused by the actor or an accomplice. Moreover, under subsection (4)(B), liability may flow from acts of resisting victims or bystanders. In addition, it will be observed that the requirements of the analogous provisions of §§ 5-10-101(a)(1) and 5-10-102(a)(1) have been relaxed: proof of conduct manifesting "extreme indifference to the value of human life" is not required. The affirmative defense available in prosecutions under § 5-10-102(a)(1) is likewise available here.

The broad coverage of § 5-10-104, considered in light of its companion provision, § 5-10-105, eliminates the necessity for an additional degree of manslaughter. If death is produced by an actor's reckless conduct, felony liability is imposed. If negligent behavior is involved, § 5-10-105 provides coverage.

1988 Supplementary Commentary to § 5-10-104

I.

Accomplice Liability

In *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978), appellant Darlene Limber was charged as an accomplice of her husband with second degree murder arising out of the death of her nineteen month old child. Affirming her conviction for manslaughter, the Court stated:

Mrs. Limber also argues that there was no evidence submitted by the State which connected her to any of the incidents or accidents that could have caused the death of Brad; that the State offered no evidence connecting her with any abuse that could have caused his death. We find no merit to this argument. The evidence, while circumstantial, indicated that she had argued several times with Limber about disciplining the children and whipping them; that Limber had beaten her and required her to seek medical assistance. She testified that she had seen him slap the child in the mouth and spank him with such force as to leave a bruise or red mark on his buttocks. She admitted that she had seen him use his foot on Brad's buttocks. She stated that she observed several bruises and cut places on Brad and she inquired of Limber about these and he explained them to her. She admitted that they had argued, perhaps twenty-five times, over his disciplining the children. *Her complicity, according to the evidence, was more than an innocent bystander.*

Id. at 488, 572 S.W.2d 407 (emphasis added).

Nowhere did the Court explicitly point out circumstances indicating that appellant, with the purpose of injuring her son or knowingly causing his death, solicited, advised, encouraged, coerced, or aided her co-defendant husband in abusing the victim. See § 5-2-403(a)(1)-(2), (b)(1)-(2). Neither did the Court find that appellant failed to discharge a "legal duty" to prevent the commission of the offense (§ 5-2-403(a)(3)) or to prevent the conduct causing the result (§ 5-2-403(b)(3).) Absent such findings or that appellant herself administered abuse leading to death, there appears to be little evidence, circumstantial or otherwise, supporting appel-

lant's conviction. Also, see *Williams v. State*, 67 Ark. 527, 593 S.W.2d 8 (1979), where the Court affirmed a conviction of battery based upon similar evidence.

See supplementary commentary to §§ 5-10-101 and 5-10-103; AMCI 1504. See, also, *Burnett v. State*, 287 Ark. 158, 679 S.W.2d 95 (1985), overruled on other grounds, *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987).

Act 990 of 1985 created the offense of permitting child abuse. See § 5-27-221. Under the new statute a parent, guardian or person legally charged with the care or custody of a child commits an offense if he "recklessly fails to take action to prevent" abuse of a child less than 11 years old. So, at least in cases involving children 10 years old and under, some of the issues raised in earlier Supplementary Commentary to §§ 5-10-103 and 5-10-104 have been addressed.

Same Act Resulting in Conviction of Offenses Requiring Different Culpable Mental States

Appellant in *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982) was convicted of manslaughter under § 41-1504 and of first degree battery under § 5-13-201(a)(3). The charges and convictions arose out of an automobile accident in which one person was killed and another seriously injured when their vehicle was struck by appellant's. On appeal, appellant argued that the evidence was insufficient to sustain the battery conviction, which required proof of conduct "under circumstances manifesting extreme indifference to the value of human life" (§ 5-13-201(a)(3)), because the jury in convicting him of manslaughter found that with respect to the victim killed, appellant had only acted *recklessly*. The Court acknowledged that conviction under § 5-13-201(a) required proof of "a more culpable mental state than recklessness." *Id.* at 21, 643 S.W.2d at 259. It went on to state that "the phrase 'under circumstances manifesting extreme indifference to the value of human life' is in 'the nature of a culpable mental state . . . and therefore akin to 'intent,' " " *Id.* at 21-22, 643 S.W.2d at 259, quoting from *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982). Evidently, the Court's unstated reasoning was that proof

of “extreme indifference” by definition also sufficed to show “recklessness.” *Cf.* § 5-2-203(c). Stated more generally, *Nolen* stands for the proposition that when a single act results in more than one consequence prohibited by statutes requiring proof of different culpable mental states, subject to the provisions of § 5-1-110(a) prosecutions for each offense are permissible.

See AMCI 1504.

Creation of New Common Law Crimes

In *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987), appellant was convicted of manslaughter for killing an unborn viable fetus in an automobile accident. He appealed, contending that the applicable statute, § 5-10-104(a)(3), providing for liability where one “recklessly causes the death of another person,” was

inapplicable, a fetus not being a “person.” “Person” is not defined by the Code.

The Court looked to the common law and found that an unborn fetus was not a “person.” *Meadows* at 107-08, 722 S.W.2d at 585. It then said, “the critical issue is whether the court ought to create a new common law crime.” *Id.* at 108, 722 S.W.2d at 585. It decided the question in the negative, citing fundamental policy reasons. *Id.* at 109, 722 S.W.2d at 586.

Ark. Code Ann. § 5-1-105(a), not mentioned by the Court, also provides an answer to the question. Subsection (a) states, “An offense is conduct for which a sentence to a term of imprisonment or fine or both is authorized by statute.” Therefore, absent constitutional authority to create an offense, the Court would appear constrained by the provisions of subsection (a) to enforcement of statutes.

Original Commentary to § 5-10-105

Section 5-10-105 is designed to cover conduct producing liability because the actor negligently fails to perceive that his conduct creates a substantial and unjustifiable risk of death to another. It should be noted that “negligence” is a term of art defined by the Code at § 5-2-202(4). Proof of negligence sufficient to generate civil liability will not suffice here. The risk not perceived by the actor must be “of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” Section 5-2-202(4). For a discussion of “criminal” as opposed to mere “civil” negligence, see, *Phillips v. State*, 204 Ark. 205, 161 S.W.2d 747 (1942).

In particular, § 5-10-105 should clarify matters in prosecutions for vehicular homicides. Formerly, the reckless driver

might have been prosecuted under either prior law previously found at Ark. Stat. Ann. § 41-2209 (Repl. 1964) (involuntary manslaughter) or Ark. Stat. Ann. § 75-1001 (Repl. 1957) [§ 27-50-307] (negligent homicide). The language of the statutes was virtually identical, the only difference being the word “willful” in § 41-2209. See, *Bentley v. State*, 252 Ark. 642, 480 S.W. 2d 346 (1972); and *Baker v. State*, 237 Ark. 862, 376 S.W.2d 673 (1964).

Under §§ 5-10-103, 104, if the driver acts recklessly, he commits manslaughter. If his conduct is negligent, he commits negligent homicide. The somewhat metaphysical exercise of ascertaining whether the actor’s conduct was willful and wanton, as opposed to just being wanton, is avoided. The test is whether the actor perceived the substantial risk of death or serious physical injury and disregarded it (reckless conduct) or failed to perceive the risk in the first place (negligent conduct).

1988 Supplementary Commentary to § 5-10-105

Amendments

Act 538 of 1987 added subsection (a). Subsection (b)(1) is the definition of the offense previously provided by § 5-10-105.

Class D felony liability is triggered by a

negligently caused death resulting from conduct of a defendant who is either intoxicated or has a .10 percent blood alcohol reading. Since subsections (A) and (B) are disjunctively cast, this is now a strict liability offense. The defendant with a

.10% blood alcohol reading whose judgment and motor skills are not affected but who has acted negligently is exposed to felony liability. Compare §§ 5-65-102(1), 103; *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984). Under the previous version of § 5-10-105 this defendant could be convicted only of a class A misdemeanor.

It should also be noted that the subsection (c) enumeration of persons placed in danger — i.e., other motorists or pedestrians — does not fit well with offenses involving aircraft or watercraft.

Reckless vs. Negligent Conduct as Issue for Trier of Fact

In *Worring v. State*, 2 Ark. App. 27, 616 S.W.2d 23 (1981), appellant was charged with first degree murder and convicted of manslaughter. On appeal she argued and the Court of Appeals found that the jury should have been instructed on negligent homicide. In so deciding the court quoted from the original commentary to § 5-2-202.

"Negligent" conduct is defined by subsection (4). It is distinguished from "reckless" conduct primarily in that it does not involve conscious disregard of a perceived risk. An actor charged with negligent homicide — for example, negligent homicide (§ 5-10-105) — is assumed to have been unaware of the existence of the risk. Under the definition, the fact finder must determine whether the actor should have

been aware of a risk. The nature and degree of the risk itself are the same for both culpable mental states.

The court went on to state, "It follows that the jury, as the finder of fact, should have been instructed on negligent homicide." *Id.* at 31, 616 S.W.2d at 25. In other words, the court appears to have read the commentary to state that in every case in which the distinction between reckless and negligent conduct is drawn in issue, the matter should be decided by the jury regardless of whether the evidence would support a conviction of an offense based upon negligent conduct. An alternative reading requiring submission of the issue to the jury only if there is a rational basis for a verdict convicting the defendant of the "negligence" offense is preferable. See § 5-1-110(c).

See AMCI 1505.

Contributory Negligence No Defense

Contributory negligence is not a defense to a charge under § 5-10-105. *Courtney v. State*, 14 Ark. App. 76, 684 S.W.2d 835 (1985), relying upon *Benson v. State*, 212 Ark. 905, 910, 208 S.W.2d 767, 769-70 (1948):

The decedent's behavior may have a material bearing upon the question of the defendant's guilt, but if the culpable negligence of the latter is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not.

Original Commentary to § 5-11-101

This section sets out the definitions of basic terms used in this chapter. The definition contained in subsection (1), "vehicle," is written in terms broad enough to include any craft or device capable of being pirated.

Subsection (2)'s "restraint without consent" is vital to the basic crime of kidnapping. It is taken almost verbatim from the definition of "unlawful removal or confinement" that appeared in the former kid-

napping statute. See, prior law formerly codified as Ark. Stat. Ann. § 41-2307 (Supp. 1973). The definition provides that minors under the age of 14 and incompetents are incapable of consent as a matter of law. The second sentence of the paragraph, defining "incompetent," was added by Act 360 of 1977.

Subsection (3) defines several types of sexual activity by cross-reference to the chapter on sexual offenses.

Original Commentary to § 5-11-102

This section sets out the elements of kidnapping. Although similar in substance to former Arkansas statutes pertaining to kidnapping, the section contains several revisions.

Subsection (a) parallels former authority to some degree by proscribing restraint without consent, substantially interfering with the freedom of the victim, for specific purposes. Compare prior law formerly found at Ark. Stat. Ann. § 41-2306 (Supp. 1973) (applicable to one who "[1] unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or . . . [2] unlawfully confines another person for a substantial period in a place of isolation, with any of the following purposes: . . .")

The Code speaks in terms of restraint rather than removal. Consequently, it reaches a greater variety of conduct, since restraint can be accomplished without any removal whatever. Moreover, restraint does not require confinement in a place of isolation. The notion that confinement must continue for a substantial period of time is retained in somewhat altered form by requiring that the restraint "interfere substantially with the liberty" of the victim. Exclusion of de minimis restraints from the definition of kidnapping is desirable since offenses such as rape or robbery necessarily contemplate restrictions on the victim's liberty while the crime is actually committed. It is only when the restraint exceeds that normally incidental to the crime that the rapist or robber should also be subject to prosecution for kidnapping.

Subsections (a)(1) through (a)(6) of § 5-11-102 cover substantially the same

ground as their counterparts found at prior authority codified as § 41-2306(a)-(d). However, the section includes two additional prohibited purposes. Subsection (a)(1) contains the phrase "or for any other act to be performed or not performed for his return or release." This language reaches conduct not intended to result in pecuniary gain to the actor. An obvious example is the kidnapping perpetrated to gain the freedom of an imprisoned third party. A second additional prohibited purpose is found in subsection (a)(4): viz., "engaging in sexual intercourse, deviate sexual activity, or sexual contact with him." These terms are defined in Chapter 14 (Sexual Offenses).

Subsection (b) preserves the grading distinction of prior authority by gearing penalties to whether the victim was voluntarily released in a safe place. See, former authority previously found at Ark. Stat. Ann. § 41-2308 (Supp. 1973). Act 474 of 1977 reclassified the offense to impose a penalty consistent with the last expression of the Legislature. See Act 628 of 1975, providing up to 99 years' imprisonment for kidnapping. The rationale underlying the diacritical grading provision is that of providing kidnappers with incentive to keep victims alive and unharmed. It also encourages second thoughts respecting the offense and, consequently, release of the victim before the police close in and the situation becomes such as to preclude a "voluntary" release. The former statute was unclear as to who had the burden of proof regarding the safe release of the victim. Subsection (6) explicitly requires the defendant to show such mitigating circumstances by a preponderance of the evidence.

1988 Supplementary Commentary to § 5-11-102

Amendments

Act 620 of 1981 reclassified kidnapping as a class Y felony and enhanced from class C to class B felony liability where the victim is safely released. See AMCI 1702-P (Supp. 1982); §§ 5-1-106, 5-4-401.

Adopting the clear language and obvious intent of the commentary to § 5-11-102, the Court has held that restraint

exceeding that normally incident to an offense forms the basis for a kidnapping charge. *Beed v. State*, 271 Ark. 526, 544-45, 609 S.W.2d 898, 910-11 (1980). *Beed* has been followed in *Frensey v. State*, 291 Ark. 268, 724 S.W.2d 165 (1987).

Ellis v. State, 279 Ark. 430, 652 S.W.2d 35 (1983) makes it clear, though the statute seems perspicuous enough on this point, that a victim need not be captured

or held at gunpoint to establish the offense.

What Constitutes Release in Safe Place

The trunk of a car is not "a safe place," nor has a person so confined been "released" under § 5-11-102(b). See *Whitt v. State*, 281 Ark. 466, 664 S.W.2d 876 (1982). In *Whitt* the victim was left in the trunk of her car at the edge of Gurdon, Arkansas. However, the location of the car — whether in an isolated area or in the center of a city — is irrelevant given the Court's holding that such treatment does not constitute "release" as required by the statute.

One who is left in his own home immobilized by being handcuffed to immovable structures has not been "released" for the purposes of a § 5-11-102(b) defense. *Clark v. State*, 292 Ark. 69, 727 S.W.2d 853 (1987).

See AMCI 1702.

Restraint

In *Cook v. State*, 284 Ark. 333, 681 S.W.2d 378 (1984) the defendant was convicted of kidnapping. He forced the victim into her car at gunpoint, demanded a ride, and struck her several times when she refused. After ten or fifteen minutes he walked away.

In affirming the conviction the Court established the following test: "It is the quality and nature of the restraint, rather than the duration, that determines whether a kidnapping charge can be sustained. . . . Once the kidnapper has undertaken the activity and the victim has been exposed to the attendant dangers, the act is complete. . . ." *Id.* at 334-36, 681 S.W.2d at 379-80.

Restraint Without Obvious Purpose

Jackson v. State, 290 Ark. 160, 717 S.W.2d 801 (1986) required the Court to resolve the problem posed by a kidnapping interrupted before the accused's plans for the victim became obvious. Appellant commandeered the victim's vehicle at knifepoint, ordering her to drive. A bystander intervened, and appellant abandoned the effort and fled. He was charged under § 5-11-102(a)(5) with restraining the victim for the purpose of "terrorizing her." Appellant argued that there was no evidence that his purpose was to terrorize the victim. The Court responded that one is presumed to intend

the natural and probable consequences of his act, *Rhine v. State*, 184 Ark. 220, 42 S.W.2d 8 (1931), and that since the victim was indisputably terrorized and no other logical explanation was provided for appellant's conduct, the Court would assume he intended the consequences of his act.

Fortuitous Restraint of Persons Other than Primary Victim

Appellant in *Dyer v. State*, 290 Ark. 405, 720 S.W.2d 297 (1986) was convicted of three counts of kidnapping and one count of rape. He had accosted the prosecutrix just as she had put her two young children under the age of three into her car. He forced her to drive away and subsequently compelled her to commit acts constituting rape. He was convicted of kidnapping the two children and, on appeal, argued that these convictions should be overturned because the children were not restrained or, if they were restrained, it was not for any purpose specified by § 5-11-102. The Supreme Court found that § 5-11-102(a)(3) had been contravened since the jury clearly could have found that the children were kept in the car to facilitate the rape. The Court went on to hold that the statute does not require that the person restrained be the intended victim of the felony facilitated by the restraint.

Jurisdiction and Venue: Kidnapping Followed by Another Offense in Another County

Two recent cases have dealt with situations where defendants kidnapped their victims in one county and committed other offenses after taking them to other county. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986) (kidnapping and rape); *Ellis v. State*, 291 Ark. 72, 722 S.W.2d 575 (1987) (kidnapping and aggravated robbery). In *Cozzaglio*, the evidence showed that the defendant kidnapped his victim in Washington County and drove her to Madison County where he raped her. There was also evidence that acts constituting rape occurred en route from Washington County to Madison County. Whether the Court found that the victim had been raped in both counties is not clear from the opinion. In *Ellis*, the defendant kidnapped his victim in Jefferson County and drove into Pulaski County where he robbed him. No aggravated robbery took place in Jefferson County.

In both cases the Court relied upon Ark. Code Ann. § 16-88-108(c) to confer jurisdiction to try all charges on the circuit court of the county where the kidnapping took place. Section 16-88-108(c) provides as follows:

Where the offense is committed partly in one county and partly in another, or the acts, or effects thereof requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county.

The implicit question decided in the State's favor in both decisions is whether the language "acts or effects thereof, requisite to the consummation of the offense" refers to elements of the offense as that term is defined in the Code at § 5-5-102(5) or, alternatively, *actual* conduct or consequences flowing from conduct required as a practical matter for consummation of an offense. Without explicitly so stating, the Court has apparently taken the position

that the latter is the case. See 1987 Supplementary Commentary to Ark. R. Cr. P. 21.2 (joinder of defendants).

In *Ellis*, after reciting the statutory language, the Court observed that "the offense of kidnapping in this case occurred in Jefferson County and culminated in the aggravated robbery in Pulaski County." *Id.* at 73, 722 S.W.2d at 576. While the statute would clearly permit either county to try appellant for kidnapping, it is difficult to see how it permits the aggravated robbery to be tried in either county unless "acts or effects ... requisite to the consummation of" refers to practical necessity.

As indicated above, the defendant in *Cozzaglio* may have committed both offenses in both jurisdictions. If the Court is holding in *Cozzaglio* that the Madison County rape should have been tried in Washington County, the practical necessity reading is again necessary.

1988 Supplementary Commentary to § 5-11-103

See AMCI 1703.

Original Commentary to § 5-11-104

Arkansas is one of the few jurisdictions in which false imprisonment has traditionally been a statutory offense. See, prior law formerly found at Ark. Stat. Ann. § 41-1601 (Repl. 1964) ("False imprisonment is the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority.") As can readily be observed, § 5-11-104 defines false imprisonment in the second degree in a manner closely paralleling former law. If past case law under former § 41-1601 is an accurate indication, most prosecutions for false imprisonment will arise out of arrests by law enforcement officers or private citizens. Consequently, the critical issue in prosecutions under § 5-11-104 will likely be the lawfulness of an arrest. Resolution of this issue is determined by traditional doctrine respecting the authority to make arrests. See, Ark. Stat. Ann. §§ 43-401 to -404; [§ 16-81-106] Ark. R. Crim. P. 4. See, also, Ark. Stat. Ann. § 5-36-116 permitting a merchant or law enforcement officer to detain for a reason-

able length of time a person who conceals merchandise on his person.

As in the case of kidnapping, false imprisonment is defined so as to require that the deprivation of liberty be substantial, in terms of either duration or degree. An inconsequential restraint does not give rise to liability. Thus, the merchant who locks his doors at closing time cannot be prosecuted even though he knowingly causes any customers in the store to wait until all are ready to leave before unlocking the door.

Section 5-11-104, by its terms, applies to the parent who takes a child entrusted to the custody of the other parent. The Commission intended, however, that the criminal law be used in custody disputes, if at all, only pursuant to § 5-26-502 (Supp. 1987), defining the offense of interference with custody. It should be noted, however, that the Code was amended by the 1977 General Assembly to add a new provision, § 5-11-106 (permanent detention or restraint), punishing as a class D felony restraint of a child by a parent who

has no “lawful authority” to do so. Apparently, therefore, conduct commonly generated by child custody disputes could conceivably be prosecuted under § 5-11-104 or 5-11-106, or, alternatively, pursuant to § 5-26-502 (Supp. 1987) if a court order is violated. However, § 5-1-110(a)(4) prevents multiple convictions of false imprisonment, interference with custody, and permanent detention or restraint as a result of the same conduct.

Section 5-11-103, false imprisonment in the first degree, is new, differing from the lesser false imprisonment offense only with respect to the exposure of the person restrained to the risk of “serious physical injury,” a term defined in § 5-1-102(19). Compare the various assaultive offenses defined in Chapter 13.

1988 Supplementary Commentary to § 5-11-104

See AMCI 1704.

Original Commentary to § 5-11-105

Subsection 5-11-105(a) sets out the elements of the offense of Vehicular Piracy, which had no analogue in former law.

Aircraft are given special treatment by the section, in recognition of the unique dangers incident to this form of piracy. Vehicular piracy can be committed with respect to *any* aircraft occupied by an unconsenting person; the requirements of § 5-11-105(a)(2) as to proof of seating capacity and common carrier status are not

imposed because of the special dangers alluded to above.

With regard to vehicles other than aircraft, cumulative proof requirements are imposed by §§ 5-11-105(a)(2)(A)-(C).

Lastly, special treatment — class B felony liability — is given the offense insofar as it involves aircraft, again because of the unavoidable dangers attending the commission of the offense.

1988 Supplementary Commentary to § 5-11-105

See AMCI 1705.

Original Commentary to § 5-11-106

This section was added by Act 360 of 1977 to cover unusual though not unheard-of situations in which a person is unlawfully restrained under circumstances not prohibited by the chapter's other provisions. An example is where a

person abducts the child of another with a view to raising it as his own as opposed to holding the child for ransom. As explained in the Commentary to § 5-11-104, this section's prohibitions overlap those of other provisions of the chapter.

1988 Supplementary Commentary to § 5-11-106

See AMCI 1706.

Original Commentary to § 5-12-102

Under prior law, robbery consisted of “the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation . . .,” the type of force or the mode of intimidation being material only to show the intent of the offender. See, prior

law formerly codified as Ark. Stat. Ann. § 41-3601 (Repl. 1964). This definition placed primary emphasis on the taking of property. If the actor was unsuccessful in his efforts to acquire property from his intended victim, he could be prosecuted for assault with intent to rob under former

Ark. Stat. Ann. § 41-609 (Repl. 1964), but not robbery.

Section 5-12-102 redefines robbery in a way that shifts the focus of the offense from the taking of property to the threat of physical harm to the victim. One consequence of the definition is that the offense is complete when physical force is threatened; no transfer of property need take place.

The word "theft," as used in § 5-12-102(a), is a term of art, drawing its content from § 5-36-103, theft of property, and § 5-36-104, theft of services. The immediacy of the threatened physical force distinguishes robbery from theft by threat. See, § 5-36-101(9) and the Commentary thereto. Earlier authority is in

accord. See, *Scifres v. State*, 228 Ark. 486, 308 S.W.2d 815 (1958).

A major deficiency of the former definition of robbery was its failure to distinguish the purse-snatcher from the armed robber. The General Assembly recognized the need for enhanced penalties for the armed robber when it enacted the felony with firearm statute, Ark. Stat. Ann. § 43-2336 (Supp. 1973) [§ 16-90-121]. Section 5-12-103 fulfills that need in a more direct fashion by setting out the new offense of aggravated robbery, defined so as to include robberies posing a risk of death or serious physical injury to the victim. Under these circumstances, robbery constitutes a class A [Y] felony, punished as severely as first degree murder or rape.

1988 Supplementary Commentary to § 5-12-102

Amendments

Act 934 of 1987 added the "felony or misdemeanor" language to subsection (a).

Resisting Apprehension After Theft

Permitting a conviction of robbery for "resisting apprehension immediately" after a theft pursuant to § 5-12-102(a) gives at least two Justices of the Arkansas Supreme Court pause. See *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979) (dissenting opinion of Justices Purtle and Hickman). This language has nonetheless been consistently interpreted in conformity with its plain meaning, with the original commentary frequently used for guidance. See commentary to § 5-12-102(a).

In *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984) (resistance in supermarket after theft) the Court of Appeals was asked to adopt the rationale of the dissenting opinion in *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979) and refused, stating that "clear legislative intent" covered circumstances where force is used after theft to avoid arrest.

Not Offense Against Ownership

Appellant in *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983) took from his victim at gunpoint property belonging to the victim's employer and to the victim. He was convicted of two counts of aggravated robbery. Citing the original commentary to this section, the Court found that these facts supported conviction only of a single aggravated robbery, since the offense was complete when physical force was threatened and robbery is not an offense against ownership.

See AMCI 2103.

Lesser Included Offenses: Battery and Robbery

Battery is not a lesser included offense of robbery. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985) (third degree battery). Aggravated robbery is a lesser included offense of battery charged under § 5-13-201(a)(4). *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983). See 1983 Supplementary Commentary to § 5-1-110.

1988 Supplementary Commentary to § 5-12-103

Instructions.

See AMCI 2102 *et seq.*

Amendments

As originally enacted, § 41-2102 (Repl. 1977) [§ 5-12-103] was a class A felony.

Punishment was governed by § 41-803 (Repl. 1977) [§ 5-4-104] and § 41-901(a) (Repl. 1977) [§ 5-4-401]. Act 1118 of 1979 added § 41-2102(3) [§ 5-12-103(c)], providing mandatory minimum terms of imprisonment where aggravated robbery was committed with a deadly weapon.

Section 41-803(1) [§ 5-4-104(a)] provides:

- (1) No defendant convicted of an offense shall be sentenced otherwise than in accordance with this Article [§§ 41-801 through 41-1309] [§§ 5-4-101 to 5-4-608].

Act 620 of 1981 amended § 41-803(3) [§ 5-4-104(c)] to read as follows:

- (3) A defendant convicted of a class Y felony . . . shall be sentenced to a term of imprisonment in accordance with Chapter 9 [§§ 5-4-401 *et seq.*].

Act 620 of 1981 amended § 41-901(1)(a) [§ 5-4-501(a)(1)] to read:

- (1) A defendant convicted of a felony shall receive a determinate sentence according to the following limitations:
- (a) For a class Y felony, the sentence shall be *not less than ten (10) years* and not more than forty (40) years, or life. (emphasis added.)

Now, § 5-12-103(c)(1) provides that a defendant who is found guilty for the first time of aggravated robbery with a deadly weapon shall be *imprisoned* for no less than *six years*. On the other hand, pursuant to the mandate of §§ 5-4-104(c) and 5-4-401(a)(1), such defendants shall be *sentenced* to not less than *ten years'* imprisonment.

Though no survey has been undertaken, it is believed that prosecutors and judges are construing the law so that § 5-4-401(a)(1), not § 5-12-103(c)(1), governs.

The supplementary commentary to § 5-4-505 addresses some of the extraordinary difficulties posed by the present combination of statutes bearing on offenses defined in terms of conduct with (1) a firearm or (2) a deadly weapon. See §§ 5-4-505; 16-90-121; and AMCI 2102, 2102-V, 2102-BV, 2102-PH, 6001 through 6003, 6106 through 6100A, 7000 through 7003.

Importance of Victim's Awareness of Circumstances

Section 5-12-103(a)(1) imposes liability for aggravated robbery if the actor "represents by word or conduct" that he is armed with a deadly weapon. In *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980), a divided Court reversed appellant's conviction of aggravated robbery (reducing it

to robbery) finding that (1) appellant had attempted to appear armed by placing his hand under his shirt and (2) his victim attached no significance to the position of appellant's hand. The Court's reasoning is summarized as follows:

Since the appellant's subjective intent does not control what is objectively conveyed to another, a hand under a shirt has no meaning in the context of an aggravated robbery statute unless the victim at least perceives it to be menacing.

Id. at 275, 600 S.W.2d at 17.

Fairchild, *supra*, has been cited with apparent approval in *Parker v. State*, 271 Ark. 84, 607 S.W.2d 378 (1980). *Fairchild* evidently holds that the victim must not only place the correct interpretation on the actor's conduct, but must also see it as "menacing" or "threatening," though this is not required by the statute. *Id.* at 275, 600 S.W.2d 17. Compare, *Alfay v. State*, 15 Ark. App. 32, 688 S.W.2d 951 (1985) (concealed hand thought by victim to hold weapon will support aggravated robbery conviction).

Double Jeopardy and Lesser Included Offenses

Whether one may be convicted of aggravated robbery and simultaneous or contemporaneous violent offenses such as attempted capital murder has been dealt with in a number of cases focusing on the constitutional prohibition against double jeopardy and § 5-1-110. As provided by § 5-1-110(a)(1) and (b)(1) a defendant may not be convicted of two offenses established by the same conduct if one is a lesser included offense of the other. *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982); *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982). Also, see *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); *Britt v. State*, 271 Ark. 488, 549 S.W.2d 84 (1977); and *Rowe v. State*, 271 Ark. 20, 607 S.W.2d 657 (1980), *cert. denied*, 450 U.S. 1043 (1981). In addition, see the supplementary commentary to § 5-1-110.

It is clear that one may be convicted of both aggravated robbery and theft of property, *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980), as well as first degree battery, *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982). Theft, conspiracy to com-

mit theft, conspiracy to commit aggravated robbery, and conspiracy to commit robbery have recently been held not to be lesser included offenses of aggravated robbery. *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983). Still, one may not be convicted of both conspiracy to commit aggravated robbery and aggravated robbery. See § 5-1-110(a)(2).

Sufficiency of Evidence of Previous Convictions

For a discussion of the proof necessary to sustain a finding of previous convictions under § 5-12-103(c)(1)-(4), see *Guzman v. State*, 3 Ark. App. 240, 625 S.W.2d 540 (1981).

See, also, *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988), where the Arkansas Supreme Court found that the State had proved three prior convictions of aggravated robbery with a deadly weapon below, although each of the three judgments introduced into evidence stated that claimant had entered a guilty plea to aggravated robbery, not aggravated robbery with a deadly weapon as charged in each information.

Resisting Apprehension After Theft

McDonald v. State, 266 Ark. 56, 582 S.W.2d 272 (1979) apparently presents one of the few cases where aggravated robbery was successfully predicated upon appellant's threat to employ physical force after a theft. See § 5-12-102(a). See also, *White v. State*, 271 Ark. 692, 610 S.W.2d 266 (1981) (robbery conviction based upon physical force to resist apprehension for theft); *Wilson v. State*, 262 Ark. 339, 556 S.W.2d 657 (1977) (same as *White*); *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984) (same as *White*).

It should be noted that the Court is not of one mind with regard to what constitutes "employ(ing) or threaten(ing) to employ physical force" (§ 5-12-102(a)) to resist apprehension for theft. *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979).

Liability of Accomplice Distinguished on Basis of Mental State

Savannah v. State, 7 Ark. App. 161, 645 S.W.2d 694 (1983) holds that one who aids or advises the planning or commission of robbery does not *ipso facto* become an accomplice to aggravated robbery committed by the person assisted. The Court

relied upon § 5-2-403 and the commentary thereto, which points out that, where the accomplice can show that the offense ultimately committed by the person assisted was not one the accomplice could have fairly envisaged, his liability is restricted to conviction of an offense consistent with his mental state. See also, § 5-2-406.

What Constitutes Deadly Weapon

For a compendious list of articles "less lethal than iron pipe" that have been held to be deadly weapons, see *Jones v. State*, 292 Ark. 183, 184-5, 729 S.W.2d 10, 11 (1987), where the Court held that a five foot length of iron pipe was obviously a deadly weapon for the purposes of a § 5-12-103 prosecution.

Proof Varying From Charge

One who is charged with aggravated robbery committed with a deadly weapon may be convicted pursuant to an instruction permitting the jury to find guilt on evidence that he "represented by words or conduct that he was armed with a deadly weapon, even if he was not actually so armed, § 5-12-103(a)(1). *Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985). Without much explanation, the Court found that the case was not governed by *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983) (Ark. Stat. Ann. § 41-1803 [§ 5-14-103] defines two offenses, and defendant charged with committing one offense cannot be convicted of committing the other). The court found that the ruling principle of *Ridgeway v. State*, 251 Ark. 157, 472 S.W.2d 108 (1971) (allegation of assault with knife proved by evidence of assault with gun) applied. *Clayborn* was subsequently overruled in *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986). See supplementary commentary to § 5-14-103.

Lesser Included Offenses

While first degree battery charged under § 5-13-201(a)(1) or (3) may be a lesser included offense of aggravated robbery charged under § 5-12-103(a)(2), *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986), assaults and batteries have been held not to be lesser included offenses of robbery charged under § 5-12-102. See *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984) and *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985).

The Arkansas Supreme Court has also held that aggravated robbery is a lesser included offense of first degree battery charged under § 5-13-201(a)(4) in cases where aggravated robbery is proved as the underlying felony to support a first degree battery charge for serious physical injury caused in the course of a felony. *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983).

Aggravated Robbery and Aggravated Assault

In *Birchett v. State*, 294 Ark. 176, 741 S.W.2d 267 (1987) appellant was convicted of aggravated robbery and aggravated assault for entering a trailer, commanding that the occupants deliver money and property, and pistol-whipping them when they refused. The Arkansas Supreme Court found that two crimes were committed and permitted both convictions, saying:

Consistent with the purpose of § 41-2102 [§ 5-12-103], the appellant committed the aggravated robbery offense when he entered the trailer and announced his intent to rob Harber and Mason. His subsequent actions to pistol-whip them constituted a separate offense, *viz.* aggravated assault.

294 Ark. at 181, 741 S.W.2d at 270.

Jurisdiction and Venue: Kidnapping Followed by Other Offense in Another County

Two recent cases have dealt with situations where defendants kidnapped their victims in one county and committed another offense after taking the victim to another county. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986) (kidnapping and rape); *Ellis v. State*, 291 Ark. 72, 722 S.W.2d 575 (1987) (kidnapping and aggravated robbery). In *Cozzaglio*, the evidence showed that the defendant kidnapped his victim in Washington County and drove her to Madison County where he raped her. There was also evidence that acts constituting rape occurred en route from Washington County to Madison County. Whether the Court found that the victim had been raped in both counties is not clear from the opinion. In *Ellis*, the defendant kidnapped his victim in Jefferson County and drove into Pulaski County where he robbed him. No aggravated robbery took place in Jefferson County.

In both cases the Court relied upon Ark.

Code Ann. § 16-88-108(c) to confer jurisdiction to try all charges on the circuit court of the county where kidnapping took place. Section 16-88-108(c) provides as follows:

Where the offense is committed partly in one county and partly in another, or the acts, or effects thereof requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county.

The implicit question decided in the State's favor in both decisions is whether the language "acts or effects thereof, requisite to the consummation of the offense" refers to elements of the offense as that term is defined in the Code at § 5-5-102(5) or, alternatively, *actual* conduct or consequences flowing from conduct required as a practical matter for consummation of an offense. Without explicitly so stating, the Court has apparently taken the position that the latter is the case. See 1987 Supplementary Commentary to Ark. R. Cr. P. 21.2 (joinder of defendants).

In *Ellis*, after reciting the statutory language, the Court observed that "the offense of kidnapping in this case occurred in Jefferson County and culminated in the aggravated robbery in Pulaski County." *Id.* at 73, 722 S.W.2d at 576. While the statute would clearly permit either county to try appellant for kidnapping, it is difficult to see how it permits the aggravated robbery to be tried in either county unless "acts or effects . . . requisite to the consummation of" refers to practical necessity.

As indicated above, the defendant in *Cozzaglio* may have committed both offenses in both jurisdictions. If the Court is holding in *Cozzaglio* that the Madison County rape should have been tried in Washington County, the practical necessity reading is again necessary.

Sufficiency of Evidence

In *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986) the Arkansas Supreme Court reversed Trotter's conviction of aggravated robbery on grounds of insufficient evidence. Trotter and an accomplice walked into a grocery store pursuant to a plan to rob it. Without saying a word, Trotter shot one customer in the neck and fired at another, who was not hit but who dropped to the floor. Reaching over a

counter, Trotter placed the gun to the customer's head, but the gun misfired. Trotter and his accomplice went outside the store, tried to repair the gun, and had turned to enter the store once more, when the arrival of other people frightened them away.

Trotter confessed after he was arrested that he went into the store after discussing the prospects of robbery with his accomplice. His confession was the only evidence of his intent to commit a robbery.

Ark. Stat. Ann. § 43-2115 (Repl. 1977) [§ 16-89-111 (1987)] provides:

[A] confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed.

The Court held that the State did not prove the offense, there being no evidence whatever other than the confession that robbery was contemplated, since neither Trotter nor his accomplice ever spoke a word, took anything, or attempted to take anything. Trotter simply opened fire.

The Court then found that, though the proof did not support a conviction of aggravated robbery, it did support a conviction of first degree battery on a lesser included offense theory. In discussing this, the Court said:

While aggravated robbery belongs in the generic class of robberies, or offenses against property, and first degree battery is an offense against persons, the two crimes overlap in this instance to make first degree battery a lesser included offense of aggravated robbery.

290 Ark. at 276, 719 S.W.2d at 271.

Though the Court's lesser included offense conclusion is correct, its characterization of robbery as an offense against property is questionable. The gist of robbery is the threat of force; it is not an offense against ownership. *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

Justices Hickman and Hays dissented, arguing that the record contained evidence from which the jury, by using common sense, could conclude that Trotter intended to commit a robbery.

Similar to the facts of *Trotter v. State* are those of *Stickley v. State*, 294 Ark. 44,

740 S.W.2d 616 (1987). Stickley was convicted of the aggravated robbery of James Massey. Stickley went to the home of Massey, a stranger, at 11:30 p.m., ostensibly to borrow gasoline. Massey went to his carport and found gasoline, but Stickley had disappeared. Massey had returned to the house when he again heard Stickley knocking on the door. When he opened the door Stickley stuck his arm in the house and pointed a pistol toward Massey. Massey closed the door, got his own pistol, and shot six times through the door, striking Stickley twice. He was able to identify Stickley at trial.

In discussing the case, the Court first observed that *Trotter* involved interpretation of Ark. Stat. Ann. § 43-2115 [§ 16-89-111(d)] providing that "a confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed." In *Stickley*, however, appellant was convicted on Massey's testimony and on that of an accomplice who testified that Stickley told him that Massey had money and that he was going to rob him. Thus, the governing statute was Ark. Stat. Ann. § 43-2116 [§ 16-89-111(e)(1)] providing, "a conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense." The Court ruled that the testimony of the accomplice "established robbery as the intended act and there was ample independent evidence connecting appellant to the commission of the offense." *Id.* at 46, 740 S.W.2d at 617-18. Justices Hickman and Glaze concurred, stating that *Trotter v. State* was controlling and should be overruled.

Since there was no evidence that an aggravated robbery took place, how the Court ruled that there was evidence tending to connect Stickley "with the commission of the offense" is unclear. The Court relied upon *Williams v. State*, 290 Ark. 449, 720 S.W.2d 305 (1986); *Bennett v. State*, 284 Ark. 87, 679 S.W.2d 202 (1984); and *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986) in reaching its conclusion. But in each of these cases the evidence indisputably showed that the offense charged had in fact been committed, the very point in issue in *Stickley*.

Stickley should be compared to *Bishop*

v. State, 294 Ark. 303, 742 S.W.2d 911 (1988), where appellant was convicted of aggravated robbery based upon testimony that he entered a liquor store, asked the owner for the price of a bottle of wine, swung the bottle at the owner's head when he asked for identification, and jumped on the counter in pursuit of the owner, swinging the bottle at his head again. The owner then shot him. Appellant's mother later told police that he told her he robbed the store to get money for Christmas. Incredibly, appellant's mother's comment about his statement came in through a police officer without a hearsay objection. On appeal, the Arkansas Supreme Court held that the statement was a "confession" under Ark. Code Ann. § 16-

89-111(d) (1987). Finding no other evidence sufficient to show that appellant intended to commit theft, the Court reversed the aggravated robbery conviction, but found appellant guilty of aggravated assault under § 5-13-204(a), an uncharged offense found to be included within the definition of aggravated robbery under § 5-12-103(a)(2). Justice Hickman filed a mordant dissent joined by Justices Hays and Glaze.

For cases presenting close questions on the evidence necessary to sustain a conviction of aggravated robbery, see *Johnson v. State*, 276 Ark. 56, 632 S.W.2d 416 (1982) and *Green v. State*, 265 Ark. 179, 577 S.W.2d 586 (1979).

Original Commentary to § 5-13-201

At common law, battery was a misdemeanor committed by the willful infliction of a corporal injury upon another. Felony or "aggravated" battery did not exist as such; criminal conduct resulting in serious, permanent injuries was termed "mayhem." Conduct amounting to attempted battery or placing another person in reasonable apprehension of receiving an immediate physical injury constituted assault. See, *M.P.C. § 211.1, Comment at 81 (Tent. Draft No. 9, 1959)*; and Proposed Oregon Code §§ 92-94, *Commentary at 95*.

In some jurisdictions, "battery" has ceased to exist as a separate offense, its elements having been assimilated into assault provisions. The Commission, however, felt that assaults and batteries were worthy of treatment as separate offenses having distinct criminal sanctions. Accordingly, the Code preserves the conceptual distinction drawn between "assaults" and "batteries" by former law. Compare, prior law previously found at Ark. Stat. Ann. § 41-601 (Repl. 1964) (assault defined) with former Ark. Stat. Ann. § 41-603 (Repl. 1964) (assault and battery defined).

Previous law on "assaultive" offenses was found in a number of statutes defining separate offenses distinguished by and graded according to the following factors: (1) motivation (e.g., former Ark. Stat. Ann. § 41-607 (Repl. 1964)) (assault with intent to rape); (2) means employed (e.g.,

prior Ark. Stat. Ann. § 41-605 (Repl. 1964)) (assault with a deadly weapon); and nature of the injury inflicted (e.g., former Ark. Stat. Ann. §§ 41-2501, et seq. (Repl. 1964)) (maiming). Under the Code, conduct is denominated a "battery" or "assault" depending on whether or not physical injury results. This primary determination having been made, both "assaults" and "batteries" are defined and graded according to the same criteria found in previous law.

The Code departs from earlier authority by requiring proof of infliction of "physical injury" or "serious physical injury" as a prerequisite for conviction of battery in every case but one. See, § 5-13-203(a)(4). This treatment finds the Commission aligned with the Model Penal Code Reporter in taking the position that with few exceptions — such as sexual offenses — merely offensive touching is not sufficiently serious to be made criminal. *M.P.C. § 411.1, Comment at 82 (Tent. Draft No. 9, 1959)*. Consequently, battery liability will no longer arise from mere unpermitted physical contact, for example, the taking of another's arm in an attempt to kiss her. Compare, *Moreland v. State*, 125 Ark. 24, 188 S.W. 1 (1916). Such conduct might, however, constitute a sexual offense under Chapter 14 or harassment under § 5-71-208. Before moving to a discussion of the individual sections, it should lastly be noted that the case law doctrine of "transferred intent" is codified by §§ 5-13-201 to 203.

1988 Supplementary Commentary to § 5-13-201

Amendments

Subsections (5)(A)-(C)(iii) were added by Act 482 of 1987. The amendment may have been suggested by the Arkansas Supreme Court's decision in *Meadows v. State*, 291 Ark. 105, 722 S.W.2d 584 (1987), where the Court determined that a viable fetus was not a "person" for purposes of the manslaughter statute.

Liability turns on committing a felony or class A misdemeanor that causes a pregnant woman to suffer a miscarriage or a stillbirth as a result of a physical injury. Subsection (5)(A) does not specify a culpable mental state. Under § 5-2-203(b) the State is required to show at least reckless conduct, however. The coverage of subsection (5)(B) overlaps with that of (5)(A) to some extent. Subsection (B) requires proof of reckless conduct under circumstances manifesting extreme indifference to the value of human life. Proof of an underlying felony or misdemeanor is not required.

Proof of Culpable Mental State

In *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977) appellant attacked his conviction under § 5-13-201(a)(3) on grounds that the culpable mental state to be proved by the State under this subsection is not set out by the statute. He also argued that the language "circumstances manifesting extreme indifference to the value of human life" (§ 5-13-201(a)(3)) is so vague as to make the statute unconstitutional on its face and as applied to him. Relying to some extent upon a decision from another jurisdiction construing a statute containing identical language, the Court found that this language adequately apprised appellant of proscribed conduct. The Court noted that § 5-2-203(b) requires proof of a mental state in all cases and that the lower court here required the state to prove purposeful conduct.

In *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982), involving an appeal from the Court of Appeals decision reversing appellee's conviction, the Court went one step further, holding that this statutory language constituted a type of mental state:

The respondent was charged with causing serious physical injury "un-

der circumstances manifesting extreme indifference to the value of human life." Ark. Stat. Ann. § 41-1601(1)(c) (Repl. 1977) [§ 5-13-201(a)(3)]. The quoted phrase is not more specifically defined in the Criminal Code, *but it is in the nature of a culpable mental state, Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977), and therefore is akin to "intent," for the proof of which evidence of other offenses is admissible under Rule 404(b).

Id. at 260, 634 S.W.2d at 119 (emphasis added).

The concurring opinion of Justice Fogleman in *Martin*, *supra* at 88-89, 547 S.W.2d at 81, 85 (1977) pointed out that "battery in the first degree requires a wanton or purposeful mental state." (Court's emphasis.) In drawing this conclusion Justice Fogleman relied upon commentary found under § 5-13-203 addressing §§ 5-13-201 to 203: "Each subsection describes conduct that would produce murder liability, if death ensued."

The Court of Appeals in *Vowell v. State*, 4 Ark. App. 175, 186-87, 628 S.W.2d 599, 605-06 (1982), apparently in reliance upon this observation, found that conviction of a charge under § 5-13-201(a)(3) requires proof that the defendant acted purposely or knowingly. The Supreme Court's decision reversing that of the Court of Appeals apparently did not affect this holding. *Vowell v. State*, 276 Ark. 258, 634 S.W.2d 118 (1982).

Then, in *Nolan v. State*, 278 Ark. 17, 21, 643 S.W.2d 257, 259 (1982), the Court found that "Either subsection [(1) or (2)] of § 5-13-201(a) requires a more culpable mental state than recklessness." Also, see *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984).

It therefore now seems established that in prosecutions under § 5-13-201(a)(3) the State is required to prove a knowing or purposeful mental state.

Lesser Included Offenses

Battery in the first degree charged under § 5-13-201(a)(4) is in a lesser included offense of aggravated robbery. *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983); *Sanders v. State*, 279 Ark. 32, 648 S.W.2d 451 (1983); *Robinson v. State*, 279

Ark. 61, 648 S.W.2d 446 (1983). It is not a lesser included offense if charged under § 5-13-201(a)(3). *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983). No cases involving a charge under § 5-13-201(a)(2) explicitly addressing the lesser included offense question have been found.

See AMCI 1601, 1601-A.

Attempted First Degree Battery vs. Third Degree Battery

The Arkansas Supreme Court has held that a defendant convicted of an attempt to commit battery in the first degree under § 5-13-201, a class C felony (one grade less than completed offense) cannot complain that the conviction is based on conduct that would suffice to show a com-

pleted battery in the third degree under § 5-13-203, a class A misdemeanor. The State is not required to charge only third degree battery or third degree battery as an alternative count. *Mitchell v. State*, 290 Ark. 87, 717 S.W.2d 195 (1986).

First Degree Battery as Lesser Included Offense of Aggravated Robbery

The Arkansas Supreme Court has determined that conduct constituting battery in the first degree under § 5-13-201(a)(1) is a lesser included offense in some circumstances of aggravated robbery, presumably charged under § 5-12-103(a)(2). *Trotter v. State*, 290 Ark. 269, 719 S.W.2d 268 (1986).

1988 Supplementary Commentary to § 5-13-202

Amendments

As originally enacted, this section provided special sanctions for batteries committed upon law enforcement officers and firemen. See § 41-1602 (Repl. 1977). Act 877 of 1981 further extended the scope of § 5-13-202 to include teachers and school employees, persons 60 years of age or older, and officers and employees of the state. Act 12 of 1983 singled out persons aged 12 or younger as a protected class.

See AMCI 1602.

Deadly Weapon Causing Physical Injury

In *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982) the Court adopted a literal reading of the language of § 5-13-202(a)(2), holding that proof of "physical injury" caused by striking another with a pistol, a "deadly weapon," establishes the offense. It is not necessary to show that the "deadly weapon" was employed in the way that originally led to its characterization as "deadly."

"Physical Injury" vs. "Serious Physical Injury"

For a discussion of the distinction between "physical injury" (§ 5-1-102(14)) and "serious physical injury" (§ 5-1-102(19)) in the context of a prosecution for second degree battery under § 5-13-202(a)(1), see *Hall v. State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984). After pointing out that the severity of injury inflicted is an issue of fact for the jury, the Court of Appeals discussed the original commentary and the evidence of injury in *Harmon*

v. State, 260 Ark. 665, 543 S.W.2d 43 (1976) (one month's hospitalization, broken leg, fractured toe, and bruised heel and pelvis). It concluded that the injuries shown in *Hall* — bruises of varying severity and signs of neglect such as uncleanness — would not, as a matter of law, support a conviction of second degree battery. It therefore appears that blows resulting in bruising that does not result in a risk of death or protracted disfigurement or impairment of health or the function of any bodily member will not support a charge of second degree battery, except under circumstances enumerated in § 5-13-202(a)(4) where proof of "physical injury" suffices. Compare, *Lum v. State*, 281 Ark. 495, 665 S.W.2d 265 (1984), where as a result of blows to the head by a fist, the victim suffered fractures in three areas of her face requiring that bones be wired together, and sustained what was shown at trial as a possible permanent loss of feeling in the right side of her face. A conviction of second degree battery under § 5-13-202(a)(1) was affirmed.

A person stabbed through the shoulder with a homemade, 3-inch-long knife sustains a "physical injury" for purposes of this section. *Hundley v. State*, 22 Ark. App. 239, 738 S.W.2d 107 (1987). See, also *Lair v. State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986).

The Arkansas Court of Appeals has decided that bruises on the face of a six month old child will suffice to show "physical injury" to prove an offense under

subsection (4)(c), where the proof also showed that appellant squeezed the child's chin and shook her face. *Middleton v. State*, 14 Ark. App. 92, 685 S.W.2d 182 (1985). See, also, § 5-1-102(14) ("physical injury" defined). See AMCI 1602.

"Continuous Occurrence" Rule

In *Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986), when appellant began hitting his victim, the victim fought back, tackling appellant. In the process the victim broke his kneecap. The Court of Appeals upheld a second degree battery conviction under subsection (a)(1), rejecting appellant's argument that he did not cause the serious physical injury in question. The court ruled that appellant's blows and the breaking of the kneecap shortly thereafter were "a part of one continuous occurrence ... [and that] there was evidence to indicate that the prerequisite intent was still present." *Id.* at 74, 702 S.W.2d at 19.

Accomplice Liability: Defendants Convicted of Different Degrees of Battery

Relying upon § 5-2-406 and *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970), the Arkansas Court of Appeals has held that an accomplice can be convicted of second degree battery for complicity in an offense for which his co-defendant is convicted of first degree battery. *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985). See, also, commentary to § 5-2-403, reciting the following general principle: "If the crime actually committed is a greater inclusive offense of the offense planned, accomplice liability respecting the intended lesser included offense attaches in connection with the aider or advisor."

Proof of Knowledge of Attendant Circumstances

In order to prove an offense under § 5-13-202(a)(4)(C) the State must show that the defendant had actual knowledge of the victim's age. *Hubbard v. State*, 20 Ark. App. 146, 725 S.W.2d 579 (1987).

Hubbard had been admitted to the Arkansas State Hospital and was being examined by Dr. Lambert when he began hitting the doctor on the head as he turned to chart some notes. Hubbard was convicted of second degree battery. At trial

and on appeal he argued that he did not know that Dr. Lambert was sixty years of age and that Dr. Lambert's aged appearance was attributable to ill-health. Hubbard was apparently aware of Dr. Lambert's health problems, as he had been treated by Dr. Lambert previously. The court reversed the battery conviction, finding insufficient proof on the mental state issue.

The culpable mental state required by the definition of the offense is "knowingly." Section 5-2-202(2) defines "knowingly" as follows: "A person acts knowingly with respect to ... the attendant circumstances when he is aware that ... that such circumstances exist."

The court interpreted the definition as follows:

We believe the test is whether from the circumstances in the case at bar, appellant, not some other person or persons, knew that his victim was sixty years of age or older. A different result by this court could have been reached had the General Assembly defined "knows to be" in the above statute to include one who has information that would lead an ordinary, prudent person faced with similar information to believe that information is fact.

20 Ark. App. at 148-49, 725 S.W.2d at 580-81.

The court appeared to find that because of Hubbard's familiarity with his victim, a "reasonable man" standard was inapplicable. Presumably, the court has not held that a jury cannot infer knowledge from proof of facts that would lead an ordinary, prudent person having similar information to believe in an alleged state of affairs. In the absence of a confession (and sometimes with a confession), the evidence never conclusively demonstrates what is "known" to a defendant. Assumptions about his knowledge are always deduced from his actions and words viewed in light of a presumption that he is sane and competent to draw inferences from attendant circumstances. So, while the prosecution must prove actual knowledge, in all but a few cases it can only do so by showing attendant circumstances and suggesting that the jury draw inferences compelled by them.

Original Commentary to § 5-13-203

For the most part, battery in the first degree comprehends only life-endangering conduct. The severity of punishment authorized is warranted by the conjunction of severe injury and a wanton or purposeful culpable mental state. Each subsection describes conduct that would produce murder liability if death resulted. See, § 5-10-103(a)(3). Subsection 5-13-201(a)(4) complements the felony murder provisions of Chapter 10.

Second degree batteries are distinguished from offenses under § 5-13-201 by the actor's state of mind or the injury suffered by the victim. Section 5-13-201(a)(1) punishes conduct calculated to cause physical injury but resulting in *serious* physical injury. The intentional infliction of physical harm by means of a deadly weapon is punished by § 5-13-202(a)(2), which, as pointed out *infra*, also covers conduct either intended to produce or actually giving rise to serious physical injury. Subsection 5-13-202(a)(3) punishes one who injures a policeman or fireman in an effort to prevent line of duty activities. Further, it should be noted that liability flows from the provision's "transferred intent" formulation if *any* person is injured. Compare, § 5-54-104 (interference with a law enforcement officer), predicated punishment on the degree of force used, rather than the injury sustained.

Section 5-13-202(a)(4) has a close analogue in § 5-13-203(a)(3) but calls for increased penalties where serious physical injury, not mere physical injury, is caused by reckless conduct, as opposed to negligence.

Felony liability for second degree battery is merited chiefly because of attendant circumstances in the cases of subsections (a)(2)-(4) (use of deadly weapon; injury to public servant), and because of purposeful conduct resulting in serious physical injury in the case of subsection (a)(1).

The following two situations have not been explicitly addressed by the Code: (1) where a person has the purpose of causing physical injury, but instead causes serious physical injury by means of a deadly weapon; and (2) where a person has the purpose of causing serious physical injury to another person but causes only physical injury by means of a deadly weapon. Liability accrues in both situations, however, since they establish a *fortiori* cases under § 5-13-202(a)(2). Situation (1) would also be covered by § 5-13-202(a)(1).

Battery in the third degree involves conduct resulting in physical injury (subsections (a)(1)-(3)) or stupor, etc., (subsection (4)). Section 5-13-203(a)(1) covers purposeful conduct producing physical injury regardless of the means employed or the person harmed. Subsection (a)(2) speaks in terms of reckless conduct, establishing as a substantive offense an inchoate homicide under § 5-13-104(a)(3) (manslaughter). Subsection (a)(3) is concerned with physical injury caused by negligent use of a deadly weapon. Under § 5-1-102(4) a "vehicle" might constitute such a weapon. Consequently, some cases of "negligent" operation of an automobile producing physical injury will fall within the purview of § 5-13-203. Of course, it should be borne in mind that "negligence" giving rise to criminal liability under the Code is not equatable with mere civil negligence. See, § 5-2-202(4).

Section 5-13-201(a)(4) penalizes conduct which, while not necessarily involving violence, constituted battery at common law. It should also be pointed out that one who purposely causes *permanent* disability by administering a drug or poison commits first degree battery. If the actor is a physician, a defense to a charge under § 5-13-201(a)(4) might be found at § 5-2-605(5), making special provision for physician conduct.

1988 Supplementary Commentary to § 5-13-203

Lesser Included Offenses: Battery and Robbery

Battery is not a lesser included offense of robbery. *Williams v. State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984); *Robinson v.*

State, 14 Ark. App. 38, 684 S.W.2d 824 (1985) (third degree battery). Aggravated robbery is a lesser included offense of battery charged under § 5-13-201(a)(4). *Sanders v. State*, 279 Ark. 32, 698 S.W.2d

451 (1983). See 1983 Supplementary Commentary to § 5-1-100.

Lesser Included Offense Instructions: Purposeful vs. Reckless Conduct

Appellant in *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986) argued on appeal from a conviction of aggravated assault that the trial court committed reversible error by refusing to instruct the jury on lesser included offenses of first, second, and third degree assault. The testimony established that appellant stuck a pistol through the open window of a car, pointing it at an occupant who grabbed it and opened the door, knocking appellant down. The Court of Appeals reversed appellant's conviction, finding that there was no basis in the record to find that

appellant acted other than purposely but that the trial court should have instructed the jury on third degree assault, which is defined in terms of purposely created apprehension of imminent physical injury. The court rejected appellant's argument about first and second degree assault because both offenses are framed in terms of *reckless* conduct. It should be noted, however, that under § 5-2-203(c) proof of a higher culpable mental state will suffice to establish a conviction of an offense defined in terms of a lower culpable mental state. Accordingly, a jury could have convicted appellant of first degree assault for purposeful conduct even though the offense only requires proof of reckless conduct. See, also, § 5-13-205.

See AMCI 1603.

Original Commentary to § 5-13-204

As previously indicated, Code assault provisions are phrased in terms of reckless risk creation and purposeful creation of apprehension of physical harm. The number of factors coming into play convinced the Commission that equitable treatment of offenders, not to mention coherence generally, demanded a graded offense. Accordingly, the Code sets out four separate assault offenses.

Treating assaults as distinct substantive offenses flows as a direct consequence of a Commission policy decision that *reckless* risk creation should generally form the minimum basis for assault liability. Of course, offenses under the sections involved — §§ 5-13-205, 206 — are also made out by proof of knowing or purposeful conduct. In permitting assault convictions grounded on reckless conduct, the

Code departs from former law under which *intent* to commit "violent injury" was required. See, prior law formerly found at Ark. Stat. Ann. § 41-601 (Repl. 1964), § 41-2507 (Repl. 1964), and *Pratt v. State*, 49 Ark. 179, 182, 4 S.W. 785, 786 (1887) ("... [T]he language of our statute has settled the question. The intention and the ability to commit the battery must both be shown, before an assault of any kind can be made out").

Section 5-13-204 is unique to this Code. The section was conceived as a means of subjecting to felony liability the actor who purposely engages in conduct placing another in extreme peril. For instance, the provision would apply to the criminal who discourages pursuit or apprehension by shooting in the general direction of bystanders.

1988 Supplementary Commentary to § 5-13-204

Because this offense is not defined so as to require proof of use of a deadly weapon, one convicted of aggravated assault is subject to the enhancement provisions of § 5-4-505. *Rust v. State*, 263 Ark. 350, 565 S.W.2d 19 (1978). It should also be noted that the convicted defendant who uses a deadly weapon to commit the offense is also now exposed to further enhancement under Ark. Stat. Ann. § 16-90-120, providing a mandatory minimum sentence of ten years' imprisonment. See supplementary commentary to § 5-4-505.

Lesser Included Offense Instructions: Purposeful vs. Reckless Conduct

Appellant in *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986) argued on appeal from a conviction of aggravated assault that the trial court committed reversible error by refusing to instruct the jury on lesser included offenses of first, second, and third degree assault. The testimony established that appellant stuck a pistol through the open window of a car, pointing it at an occupant who grabbed it and opened the door, knocking appellant

down. The Court of Appeals reversed appellant's conviction, finding that there was no basis in the record to find that appellant acted other than purposely but that the trial court should have instructed the jury on third degree assault, which is defined in terms of purposely created apprehension of imminent physical injury. The court rejected appellant's argument about first and second degree assault because both offenses are framed in terms of

reckless conduct. It should be noted, however, that under § 5-2-203(c) proof of a higher culpable mental state will suffice to establish a conviction of an offense defined in terms of a lower culpable mental state. Accordingly, a jury could have convicted appellant of first degree assault for purposeful conduct even though the offense only requires proof of reckless conduct. See, also, § 5-13-205.

See AMCI 1604.

1988 Supplementary Commentary to § 5-13-205

See AMCI 1605.

Original Commentary to § 5-13-206

As indicated *supra*, the offenses defined by §§ 5-13-205, 206 are distinguished from aggravated assault and prior law in that they may be committed by persons not purposefully creating the risks involved. Since proof of intent to injure is not required, prosecution may be occasioned by a prank or practical joke, so long as the requisite risk results. Misdemeanor liability for the reckless risk creation contemplated by both sections seems clearly appropriate. A fortiori, such liability is justified by, and arises from, purposeful creation of these risks. See, § 5-2-203.

First and second degree assaults differ only in the gravity of the risk created. The definition of first degree assault speaks in terms of a substantial risk of death or serious physical injury, while that of second degree assault requires substantial risk of physical injury. Requiring "substantial" risks ensures that liability does not arise as a result of patently harmless conduct or conduct which poses no actual appreciable risk to a person.

1988 Supplementary Commentary to § 5-13-206

See AMCI 1606.

Original Commentary to § 5-13-207

Section 5-13-207 grounds liability on purposeful creation, by any means, of apprehension of imminent physical injury. Former law was framed more restrictively; accountability arose only if a weapon was used to instill fear in another. See, prior law formerly codified as Ark. Stat. Ann. § 41-4001 (Repl. 1964). The Code provision requires fear of *imminent* physical injury. Therefore, verbal threats

not accompanied by present ability to cause harm fall outside the section's scope. Furthermore, since there is no requirement that the apprehension be reasonable, one cannot defend a prosecution under the section by showing that his victim's fear was irrational. In other words, the gravamen of the offense has to do with the actor's purpose, not the reasonableness of the victim's reaction.

1988 Supplementary Commentary to § 5-13-207

Lesser Included Offense Instructions: Purposeful vs. Reckless Conduct

Appellant in *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986) argued on appeal from a conviction of aggravated assault that the trial court committed reversible error by refusing to instruct the jury on lesser included offenses of first, second, and third degree assault. The testimony established that appellant stuck a pistol through the open window of a car, pointing it at an occupant who grabbed it and opened the door, knocking appellant down. The Court of Appeals reversed appellant's conviction, finding that there was no basis in the record to find that appellant acted other than purposely but that the trial court should have instructed

the jury on third degree assault, which is defined in terms of purposely created apprehension of imminent physical injury. The court rejected appellant's argument about first and second degree assault because both offenses are framed in terms of *reckless* conduct. It should be noted, however, that under § 5-2-203(c) proof of a higher culpable mental state will suffice to establish a conviction of an offense defined in terms of a lower culpable mental state. Accordingly, a jury could have convicted appellant of first degree assault for purposeful conduct even though the offense only requires proof of reckless conduct. See, also, § 5-13-205.

See AMCI 1607.

Original Commentary to § 5-13-208

Section 5-13-208 is taken almost verbatim from Proposed Massachusetts Code C. 265, § 12. It defines an offense similar to prior law formerly found at Ark. Stat. Ann. § 41-4001 (Repl. 1964) (drawing deadly weapons — threats) but is more comprehensive since it reaches kinds of coercive conduct other than threats involving weapons.

Under an analogous Model Penal Code provision (§ 212.5), the state is required to show that the threats on which prosecution is based were made for other than benign purposes. Such an approach appears too restrictive. Liability should attach where one makes a prohibited threat to further what he may consider legiti-

mate ends, for example, preventing an adult from drinking or gambling. The gravamina of the offense are the fear generated by the threats and the restrictions on another's freedom of action. The fact that the actor might think his conduct justified or even praiseworthy should not provide a defense.

The offense should be distinguished from theft by threat under § 5-36-103(a)(2) (Supp. 1987), the thrust of which is the extortionate acquisition of another's property, and terroristic threatening under § 5-13-301, the gist of which is instilling fear — not securing compliance with a demand.

1988 Supplementary Commentary to § 5-13-208

See AMCI 1609.

Original Commentary to § 5-13-301

Terroristic threatening is a new offense encompassing conduct dealt with ineffectively by prior law. Several considerations led the Commission to deal with the conduct proscribed as a separate offense. First, the section is designed to reach efforts to terrorize another by conduct not punishable as assaultive because apprehension of *imminent* injury is not required. The extreme nature of the harm

threatened also distinguishes this kind of behavior from that proscribed by § 5-13-207 and led to treatment of the conduct as a discrete crime.

As is implied by the section's title, the provision's main application involves conduct causing or calculated to cause a prolonged state of terror. Accordingly, § 5-13-301 supplements the coverage of §§ 5-71-208 to 211 (harassment, harassing

communications, communicating a false alarm, threatening a fire or bombing). Ultimately, § 41-1608 is also intended to

forestall breaches of peace that might ensue as a reaction to the fear produced by the threats.

1988 Supplementary Commentary to § 5-13-301

Amendments

The original version of this provision imposed class D felony liability for threatening to cause death or serious physical injury to a person or substantial damage to his property. See § 41-1608 (Repl. 1977). Act 753 of 1979 introduced grading distinctions depending upon the gravity of the conduct by creating first and second degree classifications of the offense.

Perhaps because of the imprecision of the word "terrorize" or because of vagueness in the original commentary, the courts have upheld convictions based on conduct not intended by its drafters to constitute this offense. The section was intended to reach repetitive conduct cre-

ating "a prolonged state of terror" (original commentary to § 5-13-301), not to apply to circumstances such as those found in *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981) (threats to shoot prosecuting witnesses causing them to fear for their lives). However, the *Warren* decision is understandable given the scope of the term "terrorize" and the absence of commentary restricting it.

See AMCI 1608, 1608.1.

Adhering to *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981), the Court of Appeals has found that a threat or act reasonably giving rise to fear constitutes an offense under § 5-13-301. A purpose to terrorize will be inferred from conduct.

Original Commentary to § 5-14-101

The general definitions for this chapter are derived largely from New York Penal Law § 130.00, which has served as a model for recent codification efforts in several other states. See, e.g., Proposed Michigan Code § 2301; Proposed Kentucky Code § 1100; and Proposed Texas Code § 2101.

"Deviate sexual activity" is given a precise definition designed to foreclose any contention that the offenses defined by this Chapter are vague in scope. The former statute, which provided merely for the punishment of "sodomy or buggery," was repeatedly attacked on that ground. See, e.g., *Connor v. State*, 253 Ark. 854, 490 S.W. 2d 114 (1973); *Carter v. State*, 255 Ark. 225, 500 S.W. 2d 368 (1973). Sodomy has been judicially defined as "unnatural sexual relations between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner." *Strum v. State*, 168 Ark. 1012, 272 S.W. 359 (1925). Except for the bestiality aspect, the definition of "deviate sexual activity" is broad enough to embrace the same types of conduct, particularly the most common forms of deviate sexual behavior, fellatio, cunnilingus, and anal intercourse. No reference to the gender of the participants is necessary

since the definition is structured so as to incorporate homosexual conduct as well as most types of unnatural heterosexual conduct. The requirement that actual penetration occur restates prior law. See, former law previously codified as Ark. Stat. Ann. § 41-814 (Repl. 1964); *Havens v. State*, 217 Ark. 153, 228 S.W. 2d 1003 (1950). The possibility of penetration by a finger, tongue, or dildo is also covered by the proposed definition. Such an act constitutes deviate sexual activity only if motivated by the desire for sexual gratification; therefore, a physician or other person who introduces a finger or foreign instrument into the specified orifices while examining or treating the person does not commit a deviate sexual act. No attempt has been made to include either bestiality or necrophilia in the definition of "deviate sexual activity" and such conduct does not constitute an offense under this chapter. Behavior of this sort is relatively rare, and the actor is more appropriately dealt with by commitment for treatment rather than imprisonment. However, if use of the criminal law is deemed desirable, Act 828 of 1977, imposing misdemeanor liability for sexual behavior with animals, provides grounds for prosecution. Bestiality could also be pun-

ished as cruelty to animals (§ 5-62-101) and necrophilia as abuse of a corpse (§ 5-60-101).

The term "forcible compulsion" was used by the legislature in 1967 in redefining the offense of first degree rape. See, Act 362 of 1967, § 1 previously indexed as Ark. Stat. Ann. § 41-3401 (Supp. 1973). Although the term was not statutorily defined, the legislature presumably intended to effect no change in the degree of force necessary to constitute the offense of rape. This chapter also employs the term "forcible compulsion" to define rape and other aggravated sex offenses. In essaying a definition of the term, the Commission likewise intended no change in traditional doctrine. Although, as indicated above, the definition is derived from the New York Penal Code, it was found to comport well with Arkansas decisional law. See, *Spencer v. State*, 255 Ark. 258, 499 S.W.2d 856 (1973) ("It may be violence or it may be putting the woman in fear, physically or mentally"); *Rogers v. State*, 249 Ark. 117, 458 S.W.2d 747 (1970) (Prosecutrix submitted through fear of children's safety); *Harrison v. State*, 222 Ark. 773, 262 S.W.2d 907 (1954); *Kindle v. State*, 165 Ark. 284, 264 S.W. 856 (1924); *Zinn & Cheney v. State*, 135 Ark. 342, 205 S.W. 704 (1918) ("(N)one of the cases hold that the [prosecutrix] has consented because, through fear for her life or bodily safety, she has ceased to resist or fails to make an outcry."); *Threet v. State*, 110 Ark. 152, 161 S.W. 139 (1913); *Pleasant v. State*, 13 Ark. (8 Eng.) 360 (1853).

The Code conclusively presumes that persons who are "mentally defective," "mentally incapacitated," or "physically helpless" are incapable of consenting to sexual conduct. Consequently, the use of forcible compulsion or the absence of consent are not elements of sex offenses proscribing conduct with persons laboring under these disabilities.

"Mentally defective" means that the person's diseased or defective mental state renders him incapable of understanding the nature of the particular sex act and its consequences. Although there is a paucity of decisional law in Arkansas on the degree of a victim's mental deficiency necessary to sustain a charge of rape or other sex offense, there is support for the proposed formulation in *Coates v. State*, 50 Ark. 330, 7 S.W. 304 (1888) (A

person is incapable of consent if "exceptional want of mental and physical development where her age is sufficient, renders her incapable of understanding the nature of the act."). The definition of "mentally defective" is confined narrowly to the condition described above. It does not include a mental disease or defect that makes a person more willing to engage in sexual conduct or removes the normal inhibitions against such behavior. If the person is capable of understanding the nature of the act, the fact that he is unable to control his conduct should not lead to imposition of criminal liability on the other participant. Nor is a person "mentally defective" merely because he does not understand the nature of the particular sex act. Such lack of understanding must be attributable to a mental disease or defect and not a general ignorance with respect to sexual matters.

The term "mentally incapacitated" appeared in the previous definition of the offense of rape in the first degree. See, former law previously found at Ark. Stat. Ann. § 41-3401 (Supp. 1973). As used there it probably covered a broader range of circumstances than does the definition of subsection (4). A narrower, more precise definition of "mentally incapacitated" is established since "mentally defective" subsumes most of the remaining circumstances previously contemplated by the former term as used in former § 41-3401. As defined in subsection (4), mental capacity consists of three elements: (1) the victim's temporary inability to appreciate or control his conduct (2) due to the influence of alcohol or drugs (3) administered without his consent. An important distinction between the conditions of "mentally incapacitated" and "mentally defective" is that inability to control conduct suffices to establish the former but not the latter; moreover, respecting subsection (4), it is not necessary that the offender administer the controlled or intoxicating substance. Liability is imposed even if the substance has been administered by another person without the defendant's knowledge. The harshness of such a rule is mitigated somewhat by the fact that § 5-14-102(d) provides an affirmative defense if the actor reasonably believed that his victim was capable of effective consent. The controlled or intoxicating substance must be administered without the

victim's consent. Thus, the knowing and voluntary use of drugs or alcohol cannot render a person "mentally incapacitated" even though his intoxication reaches the point where he is incapable of appreciating or controlling his sexual activities. However, if a person completely loses consciousness, then regardless of how the responsible substance was administered, the person is "physically helpless" within the meaning of subsection (5).

"Physically helpless" appeared in the former statute defining rape in the first degree, but neither that statute nor case law interpreting it defined the term. The definition of subsection (5) covers two situations. The first is where the victim is unconscious, which could mean any condition from a deep sleep to complete insensibility as a result of illness or the excessive use of an intoxicating substance. See, *Harvey v. State*, 53 Ark. 425, 14 S.W. 645 (1890); *State v. Peyton*, 93 Ark. 406, 125 S.W. 416 (1910). The other situation occurs when the victim is aware of what is taking place but is unable to indicate lack of consent because of paralysis or other physical disability.

"Public place" is defined broadly to include any locality to which substantial numbers of people have access. The same definition appears in § 5-71-101 of the chapter titled offenses against public order. As expressly stated in the definition, whether the property is publicly or privately owned is not a determinative factor. Hence, a bar or even a private club can be a "public place" if open to substantial numbers of people. Implicit in the definition of public place is that it must be accessible to substantial numbers of people at any one time. A place that is licensed to the general public, but is available to only a few members of the public at any one time, as for example a motel or hotel room, is not a "public place."

"Public view" includes all that can be seen by a person in a public place. Note that it is the location of the viewer, not the situs of the activity viewed, that determines the public character of the view. Therefore, the person who sunbathes in his own backyard does so in public view if the backyard is readily observable from the adjacent street.

"Sexual contact" subsumes a broad array of sexual intimacies that fall short of sexual intercourse or deviate sexual activity. Its synonym under former law was "fondling." See prior law previously found at Ark. Stat. Ann. § 41-1128 (Repl. 1964) ("to intentionally place ... hands upon or against a sexual part of a male or female or ... upon the breast of a female ..."). "Sexual contact" is broader, however, since it applies to a person who induces another to touch his sex organs or her breast. If actual penetration of the vagina or anus occurs, then the actor has graduated from "sexual contact" to "sexual intercourse" or "deviate sexual activity" and, depending on attendant circumstances, may be guilty of rape or a degree of carnal abuse. This supersedes *Watt v. State*, 222 Ark. 483, 261 S.W. 2d 544 (1953), which appears to hold that digital penetration of the vagina does not constitute "sexual intercourse," "carnal abuse," or "carnal knowledge." The contact must be for the purpose of gratifying the sexual desires of at least one of the participants; a touching of the sex organs or breast during the course of legitimate medical treatment does not constitute sexual contact.

"Sexual intercourse" is defined in a fashion that restates the common law doctrine that any penetration suffices to constitute the act. See, *McDonald v. State*, 225 Ark. 38, 279 S.W.2d 44 (1955); *Poe v. State*, 95 Ark. 172, 129 S.W. 292 (1910). The definition is necessarily restricted to heterosexual conduct.

1988 Supplementary Commentary to § 5-14-101

Prior to 1975 Arkansas statutes defining sexual offenses were frequently attacked on the ground of vagueness. The drafters of the Criminal Code sought to remedy this by defining sexual offenses with considerable specificity. As might be expected this specificity has prompted defenses based on the fact that a particular

sexual act did not fall within the technical definition of an offense.

Sexual Intercourse

Probably the most serious challenge along these lines occurred in *Hice v. State*, 268 Ark. 57, 593 S.W.2d 169 (1980), which involved the degree of penetration neces-

sary to constitute "sexual intercourse," a definition essential to the offense of rape. The evidence indicated that the defendant had penetrated the vulva of the prosecutrix, but there was no evidence of penetration past the hymen. As early as 1910 the Arkansas Supreme Court held that any actual penetration of the body was sufficient to sustain a conviction of rape and that the hymen need not be ruptured or torn. *Poe v. State*, 95 Ark. 172, 129 S.W. 292 (1910). The Code defines sexual intercourse as "penetration, however slight, of a vagina by a penis," and the original commentary characterized this definition as a restatement of the common law rule adopted in *Poe*. Nevertheless, the defendant in *Hice* argued that the use of the term "vagina" changed the traditional rule by requiring a deeper penetration of the body since the hymen is located at the entrance of the vagina. Although clearly concerned by the argument, the Court concluded that the General Assembly did not intend such a far reaching change in the crime of rape when it adopted the definition of sexual intercourse. In doing so, the Court relied not only on the original commentary's characterization of the definition as a restatement of prior law but also the absurdity of applying the distinction urged by the defendant to a case involving a female whose hymen had disappeared as a result of sexual activity. See also, *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979).

Deviate Sexual Activity

A somewhat similar argument regarding the Code's definition of "deviate sexual activity" was made by the defendant in *Hoggard v. State*, 277 Ark. 117, 640 S.W.2d 102 (1982), who argued that deviate sexual activity did not include performing the act of fellatio on another since it did not result in the penetration of the body of the victim. The Court's rejection of this argument is clearly warranted by the definition of deviate sexual activity as including "the penetration, however slight, of the anus or mouth of one person by the penis of another" without regard to whose body is penetrated, as well as by the statement in the original Commentary to the effect that the definition is broad enough to include fellatio.

In addition to prompting technical de-

fenses of the type raised in *Hice* and *Hoggard*, the greater specificity with which the Code defines sexual offenses has probably led courts to place more emphasis on the victim's description of the sexual activity involved in a particular case. In *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980) and *Gardner v. State*, 263 Ark. 739, 597 S.W.2d 74 (1978), the court sustained convictions in which the prosecution elicited testimony phrased in terms of the Code definition of sexual intercourse. In *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983), however, the Court reversed a rape conviction because the victim's testimony that the defendant "began licking my bottom" did not prove the penetration of the victim's vagina or anus by the defendant's tongue as required by the alternative definition of deviate sexual activity.

Sexual Contact

The definition of "sexual contact" in subsection (8) has also been strictly construed. In *Kraemer v. State*, 283 Ark. 36, 670 S.W.2d 445 (1984), the defendant was charged with sexual abuse in the first degree after he touched a twelve year old girl on the buttocks. The Supreme Court dismissed the conviction on the grounds that touching of the buttocks was not prohibited sexual contact within the meaning of § 5-14-101(8).

Forcible Compulsion

The term "forcible compulsion" has been considered in several cases since the enactment of the Code. Most of these opinions are unexceptional, and the result reached comports with the statement in the original commentary that the drafters of the definition of "forcible compulsion" intended to effect no change in the degree of force necessary to constitute the offense of rape. See, e.g., *Fink v. State*, 265 Ark. 865, 582 S.W.2d 3 (1979) (threat by father to whip child with belt); *Jennings v. State*, 268 Ark. 216, 594 S.W.2d 855 (1980) (threat to kill victim if she made any noise accompanied by application of headlock); *Banks v. State*, 277 Ark. 28, 639 S.W.2d 509 (1982) (threat to "do something crazy", "get" the victim's parents, and beat victim).

In at least two rape cases, however, the Supreme Court has reversed or modified convictions on the grounds that there was

insufficient evidence of forcible compulsion. In *Nelson v. State*, 262 Ark. 391, 557 S.W.2d 191 (1977), the victim testified that she submitted to sexual intercourse out of fear that the defendant would have a heart attack if she resisted, but the Supreme Court concluded that the threat of physical injury to "any person" did not include the threat of injury to the perpetrator of a rape. *Mills v. State*, 270 Ark. 141, 603 S.W.2d 416 (1980) involved two separate charges of homosexual rape. The Court concluded that consensual sexual activity occurred when the victim submitted following threats by the defendant to tell everyone that the victim was "chicken." On the other charge, the evidence indicated that after the sexual activity had occurred, the defendant had threatened to "kick his butt" if the victim told anyone of the incident. The Court held that a threat made after the act did not support a conviction of rape and expressed doubt as to whether the threat would have constituted forcible compulsion even if communicated before the sexual activity. The Court also rejected testimony by the victim that he was afraid of being killed or "beat up", stating that "(s)ubjective feelings of fear of physical injury by the victim must be based on some act of the accused that can be reasonably interpreted to warrant such fear." This suggests that an objective test applies when a rape is alleged to have been accomplished through a threat of death, physical injury, or kidnapping — i.e., how would a hypothetical "reasonable victim" have reacted to the conduct of the defendant.

The use of sheer physical force, without the threat of death or injury, was considered in *Canard v. State*, 278 Ark. 372, 646 S.W.2d 3 (1983). The only evidence of forcible compulsion was the testimony of the victim, who was the daughter of the defendant, that the defendant "started raping me" and "she didn't want to, but he did anyway." The Court held this sufficient evidence of sexual intercourse by forcible compulsion, stating that the quantum of force used need not be considered so long as the act is committed against the will of the victim.

It is interesting to note that *Nelson*, *Mills*, and *Canard* involved sexual activity with minors which clearly constituted carnal abuse in one of the degrees defined in §§ 5-14-104, 5-14-105, or 5-14-106. The

forcible compulsion issue arose in each case only because the prosecution sought conviction for the more serious offense of rape.

Where rape involving "forcible compulsion" is charged (§ 5-14-101(2); 103(a)(1)), the victim is young, and defendant stands *in loco parentis* to her, the Court will find forcible compulsion on evidence of coercion by vague menaces and admonitions not to tell. *Griswold v. State*, 290 Ark. 79, 716 S.W.2d 767 (1986), quoting with approval, *Tryon v. State*, 567 P.2d 290 (Wyo. 1977) ("the standard of resistance in rape cases is a relative one, i.e., a victim is not required to do more than her age, strength, surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest opposition"). 290 Ark. at 86, 716 S.W.2d at 770.

A closer case was presented in *Flurry v. State*, 18 Ark. App. 64, 711 S.W.2d 163 (1986), where the victim was the 14-year 8-month-old daughter of appellant. She testified that her father had intercourse with her despite her asking him to desist. She was upset and crying, but she testified that she did not scream or kick. Appellant argued unsuccessfully that the State had not proved forcible compulsion.

The Arkansas Supreme Court has split 4-3 on whether cupping a breast firmly and squeezing it through clothing constitutes "sexual contact ... by forcible compulsion." Section 5-14-108(a)(1); *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986). The majority answered the question in the affirmative. Justices Holt, Purtle, and Newbern, in a concurring opinion by Justice Newbern, took the position that appellant, "an amorous preacher," *id.* at 340, 719 S.W.2d at 691, did nothing "by forcible compulsion" when he put his arms around a 15-year-old and touched her breast. "Forcible compulsion" is defined at § 5-14-101 as "physical force or a threat, expressed or implied, of death or physical injury to or kidnapping of any person."

After discussing cases from a number of jurisdictions, the concurrence concluded that the evidence showed neither violence nor compulsion in the sense that the victim was required to perform any act against her will.

Compare *West* with *Mallett v. State*, 17 Ark. App. 29, 702 S.W.2d 814 (1986), where the Court of Appeals held that

touching the breast of a 13 year old through a nightgown constituted sexual abuse in the first degree under § 5-14-108(a)(3). "Sexual contact" does not require a direct touching of flesh. § 5-14-101(a).

Public Place

The term "public place" is important to the offenses of public sexual indecency and public exposure. In defining this term and its companion term "public view", the drafters of the Code left more room for future judicial delineation than is the case with most of the terms used in this chapter. In *State v. Black*, 260 Ark. 864, 545 S.W.2d 617 (1977), a defendant who was discovered committing a homosexual act in the "drunk cell" of a city jail was charged under § 5-14-111, which defines public sexual indecency to include engaging in deviate sexual activity in a public place or in public view. The original commentary to the Code states: "A place that is licensed to the general public, but is available to only a few members of the public at any one time, as for example a motel or hotel room, is not a 'public place'." The defendant argued, in apparent reliance on this statement, that a jail licensed to only a few members of the public at one time was not a public place. In rejecting this argument, the Supreme Court relied on a Texas decision, *Bishoff v. State*, 531 S.W.2d 346 (Tex. Cr. App. 1976), which involved identical conduct under an identical statute, and a Maryland decision, *Messina v. State*, 212 Md. 602, 130 A.2d 578 (1957), which involved the proof necessary to sustain a conviction of public exposure. The Arkansas court approved language from the latter opinion to the effect that: "An exposure is 'public,' or in a 'public place,' if it occurs under such circumstances that it could be seen by a number of persons, if they were present and happened to look." Applied literally

and out of context, this definition would render the bedroom of a private home a public place. When it made the quoted statement, the Maryland court was responding to an argument that exposure on a public street was not public if observed by only a single member of the public. In this context, the Court's description of a public place makes sense. For purposes of the Arkansas statute the quoted language should obviously be qualified to require that there be some likelihood that a number of persons might be present. The Arkansas Court seems to have recognized the necessity for such a requirement since immediately following its quote of the language from the Maryland decision, it observed that it was not uncommon for other persons, such as inmates or those visiting inmates, to be in the vicinity of the "drunk cell" and able to view activity in the cell.

Mentally Incapacitated

Subsection (4), defining "mentally incapacitated" as amended by Act 327 of 1985, now speaks solely in terms of incapacity to control conduct, the ability to *appreciate* the nature of conduct no longer being relevant. By narrowing the definition's scope, the amendment correspondingly diminishes the ambit of §§ 5-14-105 and 5-14-109, the two sections in which "mentally incapacitated" is used.

Sexual Contact

As indicated in the 1983 Supplementary Commentary, in *Kramer v. State*, 283 Ark. 36, 670 S.W.2d 445 (1984) the Arkansas Supreme Court reversed a first degree sexual abuse conviction on grounds that touching another's buttocks was not prohibited sexual contact under § 5-14-101(8). The General Assembly responded with Act 563 of 1985, amending subsection (8) to include the reference to "buttocks," and thereby overruling *Kramer*.

Original Commentary to § 5-14-102

Several of the offenses in this chapter are defined so as to exclude conduct with the offender's spouse. Subsection (a) makes it clear that a defendant can be convicted as an accomplice if he aids another person to commit such an offense with the defendant's spouse. See, also, § 5-2-405(1).

Subsection (c) ameliorates the traditional strict liability rule of carnal abuse and related offenses by providing an affirmative defense to the actor who reasonably believes that his sex partner is older than is actually the case. The relaxation does not apply to an offense, such as rape, which is based on the partner being less

than 14 years of age. A further qualification is that the actor can always be convicted of another offense based on the age that he actually believed his partner to be. For example, the defendant who reasonably believes that the other participant in proscribed sexual conduct is 15 years of age rather than 13, has an affirmative defense to a charge of carnal abuse in the first degree, but not to carnal abuse in the third degree.

Subsection (d) extends the same rule to offenses where the other participant is mentally defective or mentally incapacitated. The logic of allowing the defense in this situation is even more compelling since judging mental capability is usually more difficult than judging chronological age.

1988 Supplementary Commentary to § 5-14-102

As originally enacted, subsections (b) and (c) spoke in terms of a critical age of eleven. Acts 281, 870, and 919 of 1985 put this section in its present form, which

speaks in terms of a critical age of fourteen. See 1985 Supplementary Commentary to § 5-14-103.

See AMCI 1813, 1814.

Original Commentary to § 5-14-103

With two exceptions, this section affords the same basic coverage as the former offense of rape in the first degree. Previous authority formerly codified as Ark. Stat. Ann. § 41-3401 (Supp. 1973) defined the latter offense as "sexual intercourse with a female: (a) by forcible compulsion; or (b) who is incapable of consent by reason of being physically helpless, or mentally incapacitated or (c) who is less than eleven (11) years old" [amended to read "14" by Act 919 of 1985; see § 5-14-103].

This and the succeeding offenses in this chapter treat non-consensual "deviate sexual activity" on a parity with non-consensual "sexual intercourse." Formerly, most behavior embraced by the term "deviate sexual activity" was punishable as sodomy under old Ark. Stat. Ann. § 41-813 (Repl. 1964), a statute that failed to distinguish between consensual and non-consensual acts. Hence, two consenting adults who engaged in deviate sexual activity were subject to the same penalties as the pederast who forcibly sodomized a young boy. The Code changes the gist of the offense of sodomy by making the absence of effective consent to the act, rather than the act itself, the gravamen of the offense. Deviate sexual activity is punishable in the same circumstances as sexual intercourse — i.e., when perpetrated by force or against a person who is incapable of consent due to age or mental condition. Although consensual deviate

sexual activity, as such, is not an offense under the Code, the basically objectionable aspects of such conduct are punishable under § 5-14-111, which prohibits the commission of a deviate sex act in public, and § 5-71-213 which prohibits lingering in a public place with the purpose of engaging in deviate sexual activity. It should also be observed that although the Code does not penalize private consensual sexual behavior of adults, subsequently enacted legislation — Act 828 of 1977 — does.

As earlier defined, rape was an offense committed by a male against a female. The Code section contains no reference to the sex of either the offender or the victim. A neuter definition is essential since incorporation of deviate sexual activity into the offense of rape means that a male could be the victim or a female, the perpetrator, of a rape. Though reversal of the traditional roles is unlikely in the context of forcible sexual intercourse, the Commission deemed it prudent to avoid any possibility of equal protection problems.

Section 5-14-103 also eliminates from the definition of rape intercourse with a mentally defective or incapacitated person. Such acts have been made a separate, less serious offense (see, § 5-14-105) since sexual intercourse with a mature, acquiescing person, who happens to suffer from a mental deficiency, hardly seems comparable to forcible intercourse or intercourse with a very young child.

Since rape is classified as an Y felony, the punishment for the offense is imprisonment for ten (10) years to life instead of the former forty (40) or life. The severity of prior penalty was thought by many observers to be the major cause of the apparent reluctance of juries to convict in rape cases. Furthermore, the narrow range of

possible punishments under prior law failed to contemplate the myriad extenuating or aggravating circumstances that might accompany a rape. Classifying rape as an Y felony also increases the maximum penalty for non-consensual sodomy from the former twenty-one (21) years to a possible life term.

1988 Supplementary Commentary to § 5-14-103

Cases since the enactment of the Code construing the terms "sexual intercourse", "deviate sexual activity", and "forcible compulsion" are discussed in the supplementary commentary to § 5-14-101.

Rape was elevated to a class Y felony by Act 620 of 1981. See supplementary commentary to § 5-4-401. Rapes committed prior to July 1, 1981, continue to be governed by prior law. *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

Bill of Particulars

The two defendants in *Bliss and Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984), filed a request for a bill of particulars to determine which part of the rape statute was involved as to each. The Supreme Court held that the state's failure to respond to the bill of particulars was prejudicial error.

When the information charges the defendant with rape by engaging in forcible sexual intercourse, it is not error to permit the state to introduce evidence that the defendant forced the victim to engage in deviate sexual activity as well as sexual intercourse. *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981).

See AMCI 1803.

Strict Liability Under § 5-14-103(a)(3)

1985 amendments to § 5-14-103 permit young teenagers engaging in consensual sexual activity to be punished by terms of imprisonment previously reserved for persons convicted of first degree murder and aggravated robbery.

Acts 281, 870, and 919 of 1985 put § 5-14-103(a)(3) in its present form. While the reasons for the amendment are obscure, the effect of the changes on the age based gradation of Chapter 14 offenses is apparent and dramatic.

Evidently mindful that under § 5-1-116 a 14 year old may be prosecuted for rape, and in an attempt to avoid making sexual

activity between contemporaries a class Y felony, an age based affirmative defense is incorporated into § 5-14-103(a)(3). As originally enacted, the affirmative defense applied in any prosecution under "this section" (§ 5-14-103) — in a prosecution for forcible rape under § 41-1803(a), for instance. But because the language creating the defense appeared in subsection (c) and was logically applicable only to cases arising under this subsection, it was thought that the courts would refuse to permit its assertion in subsection (a) or (b) cases. When the section was recodified as § 5-14-103, "this section" was changed to "this subdivision."

Subsection (a)(3) now imposes strict liability where the victim is less than 14 years of age. As a result, the recently turned 16 year old female who engages in sexual intercourse with a male who is about to turn 14 not only commits a felony but is exposed to a *minimum* sentence of ten years' imprisonment and a maximum sentence of life imprisonment. Before enactment of the amending 1985 legislation this conduct was punishable under § 5-14-107 as a class B misdemeanor by a maximum sentence of ninety days' incarceration.

In addition, as amended this section undercuts § 5-14-104 (carnal abuse in the first degree). Under § 5-14-104 the 18 year old defendant — i.e., the older and, therefore, more culpable accused — is exposed only to class B felony liability for identical conduct with a 13 year old.

Multiple Convictions Based on Same Conduct

In *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985) the Court of Appeals upheld the defendant's convictions of burglary and attempted rape.

The evidence showed that the defendant entered the victim's home uninvited and solicited sex without physically abus-

ing her or attempting to do so. The victim understandably became agitated, ran from her home, and contacted the police, who arrested defendant shortly thereafter. The court found that the unlawful entry followed by the defendant's entreaties constituted "a substantial step in a course of conduct intended to culminate in the commission of an offense." § 5-3-201(a)(2).

The four judge majority opinion did not touch on whether convictions of both attempted rape and burglary could stand under § 5-1-110, since this issue was not raised at trial or briefed on appeal. A concurring opinion argued, however, that had the question been faced both convictions should stand because "it is not necessary to prove an unlawful entry into an occupiable structure to establish rape or attempted rape." *Id.* at 140, 690 S.W.2d at 732.

Two judges dissented from the affirmation of both convictions, stating that, since the court found that defendant's entry into the house and the solicitation of the victim constituted the substantial step on which defendant's conviction of attempted rape was based, the convictions were *in fact* based upon the same conduct. In other words, the concurring opinion interprets § 5-1-110 to require that the Court compare statutory definitions in determining whether one offense "is established by proof of the same or less than all the elements required to establish the commission of [another offense]." § 5-1-110(b)(1). The dissent, on the other hand, seems to argue that the determination should turn on whether the same conduct is *actually* the basis for each conviction. No Arkansas case has been found in which these alternative readings of § 5-1-110 have been drawn in issue. Since the majority in *Avery* did not reach this issue, the question has not yet been decided. It should be noted, however, that in *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983) in a discussion of whether convictions for battery in the first degree under § 5-13-201(a)(4) and aggravated robbery could stand, the Court said:

The information charged battery in the first degree by use of the pistol which was used to commit the aggravated robbery. Therefore, *the facts* of the present case *required proof* of the aggravated robbery, the underlying

felony, in the course of proving battery in the first degree which was alleged to have been committed during the course of a felony. Under the informations here in question the greater offense *was actually included* in the lesser offense.

Id. at 183, 644 S.W.2d 275.

Reclassification of Offense

Reclassification of rape as a class Y felony was held in *Young v. State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985) to be a substantive change. A defendant charged with an offense after the effective date of the reclassification amendment must be tried under substantive law in effect when the offense was committed. Though the court made no broad finding applicable to past and future reclassifications, the assumption that *Young* will govern is obviously advisable. See also *Smith v. State*, 277 Ark. 64, 639 S.W.2d 348 (1982).

Rape: Whether Evidence must Conform to Specific Charge

In *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983), appellant was charged with rape by deviate sexual activity. The proof showed that he committed rape by forcible sexual intercourse. The Arkansas Supreme Court reversed his conviction, finding that the State did not prove the crime charged, since rape can be charged in either of two ways under § 5-14-103(a), which speaks alternatively of "sexual intercourse or deviate sexual activity." The Court went on to say:

The test for determining whether an information for one offense includes another is whether the offenses are of the same general character and whether the information for one offense contains all of the essential elements of the other... [In the case at bar] essentially two different crimes are involved... Where two different crimes are involved the defendant may not be, as here, charged with a crime and convicted of another."

278 Ark. at 536, 647 S.W.2d at 435.

As precedent, *Clayborn* was short lived. In *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986), the Arkansas Supreme Court held that § 5-14-103 "provides for just one offense of rape with two different ways of commission ... The elements of the offense are the sexual act and forcible

compulsion.” 288 Ark. at 351, 705 S.W.2d at 426. The Court explicitly overruled *Clayborn* and, in fact, found that *Clayborn* had perhaps been impliedly overruled earlier in *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985).

Appellant in *Cokeley* was charged with rape by sexual intercourse. The State proved sexual intercourse and deviate sexual activity. The trial court instructed the jury that it could convict defendant of rape upon proof of either. The Court held that “there is only one crime of rape with two possible means of commission,” *id.* at 353, 705 S.W.2d at 425, and that appellant was not surprised or otherwise prejudiced when the trial court instructed the jury that it could convict upon proof of either act. Justices Dudley and Newbern dissented, arguing that rape by deviate sexual activity and rape by sexual intercourse are separate crimes having different elements and are not of the same general character. The dissent also pointed out that the Court could not tell from the general verdict whether appellant had been convicted of the crime charged (rape by deviate sexual activity) or whether guilt had been predicated on forcible sexual intercourse, which was not charged.

The Court’s ruling in *Cokeley* seems unexceptionable, especially where the record does not reflect any possibility of defendant’s being misled to his detriment by specification of a single method of committing the offense.

If one concludes that rape by forcible sexual intercourse and rape by deviate sexual activity are in general crimes of the same nature involving sex by compulsion, the Court’s decision in *Cokeley* is supported by cases such as *Ridgeway v. State*, 251 Ark. 157, 472 S.W.2d 108 (1971) (variance between information and proof as to type of deadly weapon used not fatal to conviction of assault with intent to kill). See, also, *Bliss v. State*, 288 Ark. 546, 708 S.W.2d 74 (1986).

Evidence Supporting Conviction

In *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987), the Court upheld imposition of felony liability upon a defendant connected to the offense by circumstantial evidence only. Payne lived with Shelley Bailey and her 11-month-old daughter, Tiffany. They brought Tiffany to

a doctor’s office with a broken neck. Payne said that the child had fallen off a couch and some steps. The mother gave virtually no explanation. The child had bruises and fractures unequivocally showing abuse. The court upheld Payne’s conviction of first degree battery, presumably under § 5-13-201(a)(3). There appeared to be no direct evidence whatever showing that Payne had caused the injury in question or that, if he did, what his culpable mental state was. See Supplementary Commentary to § 5-10-103 (*Evidence Supporting Conviction*) and to § 5-10-104 (*Accomplice Liability*).

Lesser Included Offenses: Carnal Abuse Not Lesser Included Offense of Rape

Carnal abuse in the first degree (§ 5-14-105) is no longer a lesser included offense of rape charged under § 5-14-103(a)(3), since proof of carnal abuse requires demonstrating an element (defendant must be at least 18) not included in rape. *Sullivan v. State*, 289 Ark. 323, 711 S.W.2d 469 (1986). See § 5-1-110(a)(1), (b)(1).

Justice Purtle dissented, noting that carnal abuse in the first degree was established by proof of the same or less than all elements of rape under subsection (a)(3) in the case at hand, appellant being over the age of 18 and the victim being under 14. In Justice Purtle’s view, whether one offense is a lesser included offense of the other depends on the facts of the case under consideration; it is not a question that the Court decides by reference to definitions of the offenses considered in the abstract. Compare supplementary commentary to § 5-14-103: *Multiple Convictions Based on Same Conduct*.

Lesser Included Offenses: Attempted Rape and Sexual Abuse in the First Degree

Sexual abuse in the first degree is a lesser included offense of attempted rape. *Speer v. State*, 18 Ark. App. 1, 708 S.W.2d 94 (1986).

Jurisdiction and Venue: Kidnapping followed by Another Offense in Another County

Two recent cases have dealt with situations where defendants kidnapped their victims in one county and committed another offense after taking the victim to another county. *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986) (kidnapping and rape); *Ellis v. State*, 291 Ark. 72, 722

S.W.2d 575 (1987) (kidnapping and aggravated robbery). In *Cozzaglio*, the evidence showed that the defendant kidnapped his victim in Washington County and drove her to Madison County where he raped her. There was also evidence that acts constituting rape occurred en route from Washington County to Madison County. Whether the Court found that the victim had been raped in both counties is not clear from the opinion. In *Ellis*, the defendant kidnapped his victim in Jefferson County and drove into Pulaski County where he robbed him. No aggravated robbery took place in Jefferson County.

In both cases the Court relied upon Ark. Code Ann. § 16-88-108(c) to confer jurisdiction to try all charges on the circuit court of the county where the kidnapping took place. Section 16-88-108(c) provides as follows:

Where the offense is committed partly in one county and partly in another, or the acts, or effects thereof requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county.

The implicit question decided in the State's favor in both decisions is whether

the language "acts or effects thereof, requisite to the consummation of the offense" refers to elements of the offense as that term is defined in the Code at § 5-5-102(5) or, alternatively, *actual* conduct or consequences flowing from conduct required as a practical matter for consummation of an offense. Without explicitly so stating, the Court has apparently taken the position that the latter is the case. See 1987 Supplementary Commentary to Ark. R. Cr. P. 21.2 (joinder of defendants).

In *Ellis*, after reciting the statutory language, the Court observed that "the offense of kidnapping in this case occurred in Jefferson County and culminated in the aggravated robbery in Pulaski County." *Id.* at 73, 722 S.W.2d at 576. While the statute would clearly permit either county to try appellant for kidnapping, it is difficult to see how it permits the aggravated robbery to be tried in either county unless "acts or effects ... requisite to the consummation of" refers to practical necessity.

As indicated above, the defendant in *Cozzaglio* may have committed both offenses in both jurisdictions. If the Court is holding in *Cozzaglio* that the Madison County rape should have been tried in Washington County, the practical necessity reading is again necessary.

Original Commentary to § 5-14-104

This section restates the former offense of rape in the second degree. See former law previously codified as Ark. Stat. Ann. § 41-3401 (Supp. 1973). The offense is titled "carnal abuse," reviving the term used in Arkansas law prior to 1967. The term is more descriptive of the conduct charged and will avoid stigmatizing as a rapist a person who has engaged only in non-forcible sexual intercourse.

The substantive changes to the offense parallel those made in the preceding section — i.e., assimilation of deviate sexual activity and elimination of references to the gender of offender and victim. The latter change is more fundamental in this than in the preceding section since carnal abuse of an underage male by an adult female is far more likely than forcible rape of a male by a female. For that reason, however, the equal protection problems are more acute since it is difficult to justify treating the 18-year-old male who seduces a 13-year-old female any differently from

the 18-year-old female who seduces the 13-year-old male.

Classifying the offense as a C felony effects a considerable reduction in the potential penalty for such conduct. This change represents a trade off designed to facilitate convictions without unduly discounting the gravity of the offense.

This and all subsequent sections defining offenses that do not include the element of force exclude from their coverage conduct with the offender's spouse. The exclusion is inoperative with respect to marriages entered in Arkansas since the minimum age for marriage (16 years) corresponds to the maximum age of the victim in all sex offenses of this chapter that are defined in terms of the victim's age. See, Ark. Stat. Ann. § 55-102 (Supp. 1971). However, Arkansas does recognize marriages of persons under age 16 if valid under the laws of the jurisdiction in which the marriage was entered. *State v. Graves*, 228 Ark. 378, 307 S.W. 2d 545 (1957). To

the extent that the marriage is legitimate, its concomitants should also be legal.

1988 Supplementary Commentary to § 5-14-104

See AMCI 1804.

Acts 281, 870, and 919 of 1985 amended § 5-14-104(b) to impose class B felony liability. See 1985 Supplementary Commentary to § 5-14-103.

Lesser Included Offenses

See supplementary commentary to §§ 5-14-103; 5-1-110.

Original Commentary to § 5-14-105

Sexual intercourse with a person who is "mentally incapacitated" previously constituted one of the most aggravated forms of rape. See former law previously codified as Ark. Stat. Ann. § 41-3401 (Supp. 1973). The Commission generally agreed that engaging in voluntary sexual conduct with a mentally defective or incapacitated person should not, as under present law, be placed in the same category as sexual acts committed by force, against an unconscious person, or with a child under 11 years of age. However, individual appraisals of the seriousness of such conduct

varied. Carnal abuse in the second degree represents a compromise between those Commissioners who viewed the conduct as comparable to engaging in sex acts with a minor under 14 years of age (carnal abuse in the first degree) and those who analogized it to engaging in sex acts with the 14- or 15-year-old minor (carnal abuse in the third degree).

The prerequisites to mental defectiveness or incapacity are set out in § 5-14-101 and explained in the Commentary thereto.

1988 Supplementary Commentary to § 5-14-105

See AMCI 1805.

Original Commentary to § 5-14-106

Carnal abuse in the third degree corresponds to the former offense of rape in the third degree. See, prior law formerly found at Ark. Stat. Ann. § 41-3401 (Repl. 1964). Former law prescribed no minimum on the age of the offender; a twelve (12) year-old male can be convicted of rape for engaging in voluntary sexual intercourse with a fifteen (15) year-old female. This section requires that the offender be at least twenty (20) years of age. By taking into account the relative ages of the participants as well as the absolute age of

the younger party, the section excludes from its ambit conduct between contemporaries.

The offense has been reduced from a felony to the highest class of misdemeanor. Although this change is based in part on recognition of the fact that individuals now reach sexual maturity at an earlier age, it also reflects the Commission's judgment that the old penalty for third degree rape exaggerated the seriousness of the offense.

1988 Supplementary Commentary to § 5-14-106

See AMCI 1806; supplementary commentary to §§ 5-14-103; 5-1-110.

Lesser Included Offenses

See supplementary commentary to §§ 5-14-103; 5-1-110.

Original Commentary to § 5-14-107

This section, which is without counterpart in present law, serves two functions. Since the offense it defines is necessarily a lesser included offense of carnal abuse in the first and third degrees, it provides a useful plea-bargaining tool when a defendant is charged with one of these offenses. Its primary purpose, however, is to fill the

gaps created by the age requirements of carnal abuse in the first and third degree. In the absence of § 5-14-107, the proscribed behavior would not be criminal if the victim is 11, 12, or 13 years of age and the offender is less than 18 years of age or the victim is 14 or 15 years of age and the offender is less than 20 years of age.

1988 Supplementary Commentary to § 5-14-107

See AMCI 1807.

Original Commentary to § 5-14-108

This section is intended to proscribe intimate bodily contact under circumstances that would constitute rape or carnal abuse if the participants engaged in sexual intercourse or deviate sexual activity. Sexual contact under the circumstances described in (1) and (2) of subsection (a) was not formerly a separate offense, although the conduct might, depending on the facts, have been punishable as assault with intent to rape, simple assault, or sodomy. Subsection (a)(3) par-

allels former Ark. Stat. Ann. § 41-1128 (Repl. 1964), which prohibited the fondling of the sexual parts of a male or female or the breast of a female, when the victim was under 14 years of age. The section also applies to the person who induces a minor to fondle his sexual organs or her breast. Since the offender must be at least eighteen (18) years old, the subsection does not encompass petting by contemporaries.

1988 Supplementary Commentary to § 5-14-108

See AMCI 1808.

Conduct Constituting Sexual Abuse in the First Degree

The Arkansas Supreme Court has split 4-3 on whether cupping a breast firmly and squeezing it through clothing constitutes "sexual contact ... by forcible compulsion." Section 5-14-108(a)(1); *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986). The majority answered the question in the affirmative. Justices Holt, Purtle, and Newbern, in a concurring opinion by Justice Newbern, took the position that appellant, "an amorous preacher," *id.* at 340, 719 S.W.2d at 69, did nothing "by forcible compulsion" when he put his arms around a 15-year-old and touched her breast. "Forcible compulsion"

is defined at § 5-14-101 as "physical force or a threat, expressed or implied, of death or physical injury to or kidnapping of any person."

After discussing cases from a number of jurisdictions, the concurrence concluded that the evidence showed neither violence nor compulsion in the sense that the victim was required to perform any act against her will.

Compare *West* with *Mallett v. State*, 17 Ark. App. 29, 702 S.W.2d 814 (1986), where the Court of Appeals held that touching the breast of a 13 year old through a nightgown constituted sexual abuse in the first degree under § 5-14-108(a)(3). "Sexual contact" does not require a direct touching of flesh. § 5-14-101(a).

Original Commentary to § 5-14-109

This section, like portions of the previous one, punishes behavior that was an offense under former law only if the facts warranted a conviction of assault with intent to rape or sodomy. For the reasons

stated in the Commentary to § 5-14-105, this offense is graded less seriously than sexual contact under the circumstances described in the preceding section.

1988 Supplementary Commentary to § 5-14-109

See AMCI 1809.

Original Commentary to § 5-14-110

This section is virtually identical in scope with prior law formerly codified as Ark. Stat. Ann. § 41-1126 (Repl. 1964) (indecent proposals to minors). It defines an inchoate form of such offenses as rape, carnal abuse in the first and third de-

grees, and sexual abuse in the first degree. Although such offenses draw distinctions based on the type of conduct or the age of the victim, such sophistication is unnecessary when the actor has *only* solicited the proscribed conduct.

1988 Supplementary Commentary to § 5-14-110

See AMCI 1810.

Original Commentary to § 5-14-111

This section prohibits an act of sexual intercourse, deviate sexual activity, or sexual contact whenever such act is likely to be observed by another person who is in a location open to a substantial number of people. As indicated in § 5-14-101 and the Commentary thereto, the fact that the site of the act is privately owned does not affect the illegal character of the act so

long as it is accessible to a substantial number of persons. Also irrelevant is the mental state of the observer, i.e., whether he knows the view is likely or whether he is offended by what he sees. Thus, the section applies to the star of a live sex show in a private club, as well as the couple in a public park intent only on their own personal gratification.

1988 Supplementary Commentary to § 5-14-111

See AMCI 1811.

Public sexual indecency as defined by § 5-14-111 is not a lesser included offense

of rape defined by § 5-14-103(a)(1). *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985).

Original Commentary to § 5-14-112

Section 5-14-112 prohibits the sexually motivated display of genitalia in two situations. Under subsection (a)(2), the location of the exhibition and the number of actual or likely observers is irrelevant so long as exposure occurs under circumstances likely to affront or alarm a viewer. If an exhibition covered by subsection (a)(2) occurs in a public place or in public view, then the actor also falls within subsection (a)(1). However, subsection (a)(1)

is primarily directed at the professional exhibitionist before a willing audience whose reaction to the exposure of sex organs is likely to be quite the opposite of affront or alarm.

The conduct defined by § 5-14-112 was previously the subject of two overlapping statutes. See, prior law formerly found at Ark. Stat. Ann. § 41-1127 (Repl. 1964) (indecent exposure to minor); § 41-2701 (Repl. 1964) (indecent exposure).

1988 Supplementary Commentary to § 5-14-112

See AMCI 1812.

Original Commentary to § 5-25-101

This section defines five terms used throughout this chapter.

The definitions of "adult" and "minor" are intended to be used for the purposes of this chapter only. They do not prescribe in other contexts when a person has reached his majority. Compare, § 5-1-116 (immaturity excluding criminal conviction).

"Incompetent" is defined to include not only the mentally deficient person but also the person who is physically incapable of

caring for himself. The second sentence of the definition makes it clear that a prior adjudication of competency or incompetency or the absence of such an adjudication is not determinative of the issue.

"Sexual intercourse" is given the same meaning here as in the chapter on sexual offenses, as is "deviate sexual activity," the definition of which was added by Act 360 of 1977. See, § 5-14-101.

Original Commentary to § 5-26-201

Subsection (a) defines the offense of bigamy, previously treated by old Ark. Stat. Ann. §§ 41-801 et seq. (Repl. 1964). The term "being married" contemplates not only a lawful marriage entered into under the laws of Arkansas, but also any marriage validly contracted in another state, including a common-law marriage contracted in a state where such marriages are recognized.

To foreclose any defenses based on the fact that a married person cannot lawfully marry another, the offense is defined in terms of "purports to marry" rather than "marries." Phrased in this fashion, the offense applies not only to the lawfully married person who makes a genuine effort to contract a second marriage but also to the lawfully married person who pretends to marry again in a bogus ceremony.

Subsection (b) alters old law with respect to defenses to a bigamy prosecution. Subsection (b)(1), (b)(3), and (b)(4) permit the accused to escape liability if he reasonably believed that, due to the death of his first spouse, a valid divorce decree, or otherwise, he was legally eligible to remarry. Prior law adopted a strict liability approach under such circumstances, rejecting any defense based on a reasonable but erroneous belief that the first marriage was terminated. See, prior authority formerly found at Ark. Stat. Ann. § 41-802 (Repl. 1964) as interpreted in *Russell v. State*, 66 Ark. 185, 49 S.W. 821 (1899). To compensate somewhat for the liberalization of such excuses for a bigamous

"marriage," the section denominates them "affirmative defenses," which places the burden of proving reasonable belief on the defendant. Under old law such circumstances, if true, constituted simple defenses.

Subsection (b)(2) restates the "Enoch Arden" defense found in earlier authority. See, previous law formerly found at Ark. Stat. Ann. § 41-802 (Repl. 1964). Section 41-802 contained a similar defense for one whose spouse had been absent from the United States for five years, regardless of whether the spouse was known to be alive. This provision has been discarded as obsolete in a period when substantial numbers of Arkansas citizens reside or travel abroad within easy reach of a spouse seeking to obtain a divorce or confirm a death. If the foreign spouse is not known to be alive, the defendant will have a defense, in any case, under subsection (b)(1). If the foreign spouse is known to be alive, the Arkansas resident should seek a divorce pursuant to Ark. Stat. Ann. § 34-1201 et seq. (Repl. 1962, Supp. 1973), before contracting a second marriage.

This section does not punish the unmarried person who participates in a bigamous "marriage." Former statutory authority subjected the unmarried person who knowingly purported to marry the spouse of another to the same penalties as the bigamist. See, prior law formerly codified as Ark. Stat. Ann. § 41-803 (Repl. 1964). The unmarried person is likewise immune to prosecution as an accomplice

to bigamy since the offense is defined so that his conduct is inevitably incident to its commission. See, § 5-2-404(a)(2).

1988 Supplementary Commentary to § 5-26-201

See AMCI 2402, 2402-D.

Original Commentary to § 5-26-202

This section, defining the offense of incest, substantially restates former law that appeared in Ark. Stat. Ann. §§ 41-811 (Repl. 1964); 55-103 (Repl. 1971). Stepchildren and adopted children have been added since intercourse or deviate sexual activity with such relatives is just as disruptive of family unity as intercourse with a person within one of the other enumerated degrees of relationship.

Since marriages between first cousins

are valid under the laws of some jurisdictions, such activity is not reached by § 5-26-202. The traditional arguments for incest statutes, preservation of family harmony and reduction of recessive genetic characteristics, are not as compelling when dealing with first cousins. The section does not make it possible for first cousins to enter a valid marriage in Arkansas; it merely precludes criminal penalties for such marriages.

1988 Supplementary Commentary to § 5-26-202

See AMCI 2403.

Original Commentary to § 5-26-203

Prior law formerly found at Ark. Stat. Ann. § 41-2225 (Repl. 1964) provided that any woman who privately endeavored either by herself or with the aid of others, to conceal the death of her child should suffer "the same punishment as for manslaughter," although it could not be proved that she committed infanticide. Resort to this statute was common where the fact of childbirth was known, but decomposition of the fetus made it impossible to determine or establish beyond a reasonable doubt that the fetus was born alive.

Much like old § 41-2225, § 5-26-203

prohibits only concealment accompanied by a purpose to prevent detection of (1) the fact of birth or (2) the child's viability at birth. Subsection (a) of § 5-26-203 is framed broadly enough to permit prosecution of any person, whether it be the mother or another. The limitation imposed by *Sullivan v. State*, 36 Ark. 64 (1880) upon former § 41-2225, that the child must be a bastard, was intentionally omitted, the Commission being able to perceive no valid reason for this distinction.

1988 Supplementary Commentary to § 5-26-203

See AMCI 2404.

Original Commentary to § 5-26-401

This section, in defining the offense of nonsupport, substantially restates prior authority. See, former law previously found at Ark. Stat. Ann. §§ 41-204 (Supp. 1973) and 41-205 (Repl. 1964). The major revision has been to define the offense solely in terms of failure to provide support, discarding as redundant the alterna-

tive bases of present law — "abandons, deserts, or leaves." In addition, the duty to support a legitimate child continues to age 18 in recognition of the fact that children now remain in school longer and accordingly require support at least through high school. A similar change was not made with respect to illegitimate children

because so many of the provisions governing bastardy proceedings are geared to age 16.

It should also be observed that the section is facially neutral with respect to the sex of the offender; wives and mothers as well as husbands and fathers are subject to prosecution. This effects a minor change in the law. Under old § 41-205 (Repl. 1964), a woman could be prosecuted for abandoning or deserting an infirm or financially dependent husband but not for failure to support him. Parity of treatment was dictated by equal protection considerations as well as the general Code policy against defining an offense that, by its terms, can only be committed by a person of a particular sex. The practical effect of treating husband and wife the same with respect to support of each other is slight since the "victim" spouse must be either "physically or mentally infirm, or financially dependent." Given present employment opportunities for the respective sexes, a wife is far more likely to be financially dependent.

Subsection (b) provides that nonsupport is a class A misdemeanor, except in two circumstances. The first is when the defendant leaves the state in order to avoid a duty to support another person. Prior law apparently imposed felony liability merely upon a showing that the defendant left the state. The difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an excep-

tion. In addition, the Commission was concerned with the fact that in an increasingly mobile society people often leave the state for reasons completely unrelated to possible support obligations. It should also be observed that § 5-1-104(a)(1) permits a person who has never entered the state to be prosecuted for nonsupport. With these considerations in mind, the penalty clause of § 5-26-401 was drafted in a way that satisfies the primary reason for imposing felony liability on the defendant who is outside the state — facilitation of extradition. Once the court acquires jurisdiction over the extra-state defendant, there seems little necessity for punishing him more severely than the person who commits the same offense but does not leave the state. If, following the return of a defendant extradited on a felony charge under § 5-26-401(b)(1), the prosecution fails to prove the requisite purpose, the court can still convict of a misdemeanor or resort to other methods of enforcing the support obligation.

Subsection (b)(2) states a second circumstance in which felony liability is imposed. By subjecting the habitual offender to more severe penalties, it parallels former law found at Ark. Stat. Ann. § 41-204(a) (Supp. 1973).

Subsections (c) and (d) restate without significant change previous authority. See, prior law formerly codified as Ark. Stat. Ann. § 41-204(b) and (c) (Supp. 1975).

1988 Supplementary Commentary to § 5-26-401

Act 174 of 1983, as indicated in its emergency clause, was intended to remove any possibility of an equal protection attack on the statute by aligning the ages of legitimate and illegitimate children entitled to statutory protection. See 1 UALR L. J. 117, 206 (1978). The 1981 amendment by Act 519 added 5-26-401 (d) and (e).

See AMCI 2405, 2405-P.

"Without Just Cause": Burden of Proof

"Without just cause" in § 5-26-401(a) means "a willful or negligent failure to provide, not a mere failure because of an inability." *Nelke v. State*, 19 Ark. App. 292, 294, 720 S.W.2d 719, 720 (1986). After examining the history of the terms "good

cause" and "just cause" in the context of nonsupport prosecutions, the Court of Appeals pointed out that "the State must prove every element of its criminal nonsupport case beyond a reasonable doubt...." *Id.* at 295, 720 S.W.2d at 720. In *Nelke*, the Court of Appeals found that appellant's testimony provided evidence of willful failure to provide support. It should be noted, however, that § 5-26-401 does not by its own terms permit an inference of lack of "just cause" merely upon proof of failure to provide. A defendant is entitled to a directed verdict if the State's case consists merely of a court order requiring support and evidence that support payments were not made. "Just cause" is not a defense; the State must prove the

absence of “just cause” in its case in chief.
See AMCI 2405.

1988 Supplementary Commentary to § 5-26-501

Act 540 of 1985 replaced §§ 41-2411 through -2414 with §§ 41-2415 and 41-2416 [§§ 5-26-501, 502], which treat interference with visitation and interference with a control as different, though

identically graded, offenses. It appears that the legislative intent was to eliminate confusion caused by enactment of Act 853 of 1983.

1988 Supplementary Commentary to § 5-26-502

In *Simms v. State*, 12 Ark. App. 254, 675 S.W.2d 643 (1984) the defendant was convicted of a class D felony under § 41-2411 for taking her minor child to Arizona. She had separated from her husband, and a decree had been entered awarding joint custody of the child. She resumed living with her husband but decided that the relationship would not work. She then consulted an attorney who, according to her testimony, advised her that resumption of cohabitation nullified the custody order previously entered. She thereupon moved with the child to Arizona.

At trial the defendant argued that she lacked the culpable mental state required by § 41-2411 because the legal advice she received led her to believe that her actions

were lawful. Neither the trial court nor the Court of Appeals treated this issue as one governed by § 5-2-206(e).

If the trial court believed that the defendant actually obtained and relied upon legal advice, it should have ruled that the State had not proved the culpable mental state element of § 41-2411, which requires the State to prove that the defendant *knew* “that he had no lawful right to do” the acts alleged. Indeed, defenses under § 5-2-206(e) may *only* be asserted in prosecutions under statutes such as § 41-2411 which require that the State prove actual knowledge of the law as an element of the offense. Compare § 5-2-206(b)-(c) with 5-2-206(e).

1988 Supplementary Commentary to § 5-26-502

Act 540 of 1985 replaced §§ 41-2411 through -2414 with §§ 41-2415 and 41-2416 [§§ 5-26-501, 502], which treat interference with visitation and interference with a control as different, though

identically graded, offenses. It appears that the legislative intent was to eliminate confusion caused by enactment of Act 853 of 1983.

Original Commentary to § 5-27-202

Sections 5-27-201 and 203 define the offenses of endangering the welfare of a minor in the first degree and endangering the welfare of an incompetent in the first degree. The elements of the substantive offenses are virtually the same. The former offense protects the child under age 10 from abandonment under circumstances likely to endanger his life or seriously injure him; the latter offense affords the same protection to an incompetent individual. Although the designation of age 10 is arbitrary, it does take into account in a crude sense the likely ability of the child to care for himself and seek the

aid of others. It should be observed that the section applies not only to parents and guardians, but also to other relatives, babysitters, or even teachers, when such persons are charged with the care of the child or incompetent.

The proposed section covers in whole or in part the following preexisting statutory offenses: Ark. Stat. Ann. §§ 41-204 (Supp. 1973) (abandoning wife or child); 41-205 (Repl. 1964) (abandoning husband or child); 41-1105 (Repl. 1964) (abandonment of child); 41-1429 (Repl. 1964) (abusing mentally retarded person).

Sections 5-27-202, 204 define the second

degree offenses of endangering the welfare of a minor and endangering the welfare of an incompetent person. Again, the major difference between the respective sections is the class of persons sought to be protected. The sections impose a general duty on all persons, regardless of their relationship to the person affected, to refrain from engaging in conduct that is likely to endanger the physical, mental, or moral welfare of a minor or incompetent. Chapter 18, dealing with sexual offenses, punishes sexual activities with the protected classes. This section is designed to safeguard minors and incompetents from

deleterious non-sexual activities. It proscribes the same sort of conduct reached by such preexisting statutory offenses as Ark. Stat. Ann. § 41-1105 (Repl. 1964) (cruelty to children); § 41-1111 (Repl. 1964) (gaming with minors); § 41-1113 (Repl. 1964) (permitting minor to play cards or billiards in saloons); § 41-1115 (Repl. 1964) (permitting minors to play in pool rooms); § 41-1117 (Repl. 1964) (selling liquors to minors); § 41-1124 (Repl. 1964) (annoying or molesting child); § 41-1130 (Repl. 1964) (tattoo of minor without parent's consent).

1988 Supplementary Commentary to § 5-27-202

See AMCI 2407.

1988 Supplementary Commentary to § 5-27-203

See AMCI 2407.

1988 Supplementary Commentary to § 5-27-204

See AMCI 2408.

Original Commentary to § 5-27-205

This offense substantially restates preexisting authority contained in Ark. Stat. Ann. § 45-239, used in conjunction with § 45-204 (Supp. 1973). See, also, old § 41-1136 (Repl. 1964), now codified as § 5-27-222.

The only addition is subsection (1)(a), which is directed at the adult who encourages the minor to engage in conduct prohibited by law. Such conduct includes not only violation of criminal statutes but also contravention of statutes designed to protect minors, whether or not they define an offense. For example, former law now recodified as Ark. Code Ann. § 5-27-228 prohibits the tattooing of minors without the parents' consent, although the minor

commits no offense by obtaining a tattoo. However, if an adult induced a minor to submit to being tattooed by a third party, the adult would be guilty of contributing to the minor's delinquency.

Subsection (a)(2) imposes liability for encouraging or causing a minor to engage in conduct that would expose the minor to criminal sanctions were it not for his age. It should be observed that the adult who urges a minor to commit an offense would also be liable as an accomplice to the offense itself under § 5-2-403(a). The fact that the minor was immune to prosecution because of his age would not be a defense in a prosecution of the adult as an accomplice. See, § 5-2-405(3).

1988 Supplementary Commentary to § 5-27-205

See AMCI 2406.

Original Commentary to § 5-35-101

This section defines key terms used in Chapter 36. In addition, several of the terms treated here also appear in the definitions section of Chapter 37 (Forgery and Fraudulent Practices) and the discussion in this commentary is equally applicable to their use in that context.

Article, Copy, Trade Secret:

The terms "article" and "copy" are used in § 5-36-107 (theft of a trade secret). The definitions are taken verbatim from the old Trade Secrets Act. See prior law previously found at Ark. Stat. Ann. § 41-3949 (Supp. 1973). The definition of "trade secret" in subsection (10) is found in that same act; the presumption that appeared in the old statute has been eliminated although the substance of the presumption has been incorporated into the proposed definition.

Deception:

The definition of "deception" is taken from M.P.C. § 223.3 (theft by deception). "Creation," as employed in § 5-36-101(3)(A)(i), contemplates both verbal misrepresentation and conduct having that effect. Whether mere conduct, as a general matter, would suffice to support a false pretense conviction under earlier law is unclear, although there was authority indicating that an affirmative misrepresentation was necessary. *McCorkle v. State*, 170 Ark. 105, 278 S.W. 965 (1926) (Sale of property carries no implied representation that property is free of liens). However, presentment of a check for payment by the drawer has been held to imply that there are sufficient funds on deposit to pay the check, and if the drawer knows that this representation is untrue, he may be convicted of obtaining money under false pretense. See, *Mortensen v. State*, 214 Ark. 528, 217 S.W.2d 325 (1949).

The language as to reinforcement "takes care of the case in which the victim of a fraud had a false impression prior to the actor's intervention, so it could not be said that the actor 'created' the impression." M.P.C. § 223.3, *Comment at 66* (Tent. Draft No. 2, 1954). Reinforcement contemplates an affirmative contribution to the false impression. Mere failure to correct a false impression is "deception"

only under the circumstances set out in § 5-36-101(3)(A)(iii) and (iv). Compare, *McCorkle, supra*.

The gravamen of the offense of "false pretense" under prior law involved a false representation of "fact." *Karr v. State*, 227 Ark. 777, 301 S.W.2d 442 (1957). It has been held in civil cases that fraud cannot be predicated on misrepresentations as to the state of the law. *Adkins v. Hoskins*, 176 Ark. 565, 3 S.W.2d 322 (1928); but see, *Fireman's Ins. Co. of Newark v. Jones*, 245 Ark. 179, 431 S.W.2d 728 (1968) (representation as to the law of a foreign state outside the rule). Subsection 3(A)(i) makes it clear that a false representation of either fact or law suffices to establish deception.

Former authority was also that "[a] false representation as an inducement to pay money that something thereafter was to be or was not to be done is not a false pretense. It is well settled in this state and elsewhere that the false pretense relied upon to constitute an offense under the statute must relate to a past event, or to some present existing fact, and not to something to happen in the future." *Conner v. State*, 137 Ark. 123, 126, 206 S.W. 747, 748 (1918). See, also, *Davis v. State*, 241 Ark. 646, 411 S.W.2d 531 (1966), supplemental opinion on reh., 242 Ark. 43, 411 S.W.2d 531 (1967); *Kerby v. State*, 233 Ark. 8, 342 S.W.2d 412 (1961); *Mortensen v. State, supra*. By imposing liability for a false representation as to a state of mind, subsection (3)(A)(i) abolishes this curious immunity. However, the last paragraph of subsection (3) precludes a successful prosecution grounded on evidence merely showing a default with respect to promised future action. The state must show that the actor did not intend at the time the promise was made to carry it out.

Subsection (3)(A)(ii) applies only if a party to a transaction actively hinders the discovery of facts that might influence the willingness of the other party to enter the transaction. As is the case under subsection (3)(A)(i), there is no affirmative duty to disclose such facts.

Subsection (3)(A)(iii) describes two situations in which the actor is under an affirmative duty to correct misinforma-

tion. The actor must be aware that the other party to the transactions is laboring under a false impression and must either be partially responsible for that false impression or stand in a fiduciary or confidential relationship to the other party. Imposing liability in the first situation is probably redundant since the actor who creates or reinforces a false impression has already engaged in "deception" under subsection (3)(A)(i). Imposing criminal liability for failure to disclose facts to one with whom the actor has a confidential or fiduciary relationship probably departs from prior law, although it is clear that such conduct will suffice to establish fraud in a civil case. See, e.g., *Johnson v. Johnson*, 237 Ark. 311, 372 S.W.2d 598 (1963).

Subsection (3)(A)(iv) of the definition imposes on the seller of property an affirmative duty to disclose liens or other legal impediments to the purchaser. Under earlier law, the seller had to expressly represent that the property was free of other claims before he was guilty of obtaining property by false pretense; the mere failure to disclose liens or legal impediments were subject at most to misdemeanor liability under old Ark. Stat. Ann. § 41-1932 (Repl. 1964) (fraudulent conveyance of property). See, *Shelton v. State*, 96 Ark. 237, 131 S.W. 871 (1910); see, also, *McCorkle, supra*. The subsection also revises prior law by making irrelevant the actual validity of the impediment. The Supreme Court held that the old false pretense statute was not violated if the encumbrance was in fact invalid since the seller's representations were true. *State v. Asher*, 50 Ark. 427, 8 S.W. 177 (1887); *Fox v. State*, 102 Ark. 451, 145 S.W. 228 (1912).

The final paragraph, (3)(B), in addition to precluding any inferences of deception based solely on the failure to perform a promise, excludes from the subsection's coverage those types of misleading statements that are ordinarily tolerated in the context of commercial dealings. Exaggerating the qualities of one's goods or services is to a certain extent expected by the public and should not deceive the ordinary person. Statements as to matters without pecuniary significance are likewise beyond the statute's ambit. See, *Morgan v. State*, 42 Ark. 131 (1883) (false representation that certain person patronized hotel held not to have defrauded guest who

stayed at hotel as result of representation).

Finally, it should be observed that the actor must believe his representation to be false or have no belief either way if his conduct is to fall within the provision. An honest but unreasonable belief in the truth of a false representation does not create liability.

Deprive:

As is the case with most former larceny offenses, the theft offenses defined in this chapter require a purpose to deprive the owner of property. Traditionally, larceny required an intent to permanently appropriate the property to the actor's own use. As defined in subsection (4), "deprive" includes the notion of permanent appropriation, but it also encompasses three additional situations.

The first is where the actor did not intend that the property be permanently withheld from the owner, but did intend that the period of appropriation would constitute a major portion of the useful life of the property. For example, the man who borrows a tool that he plans to return as soon as it wears out intends to deprive the owner of the tool.

The second situation in which the actor intends to deprive is when he plans to return the property to the owner, but only after payment of a ransom, reward, or repurchase price. A deprivation under these circumstances has substantially the same pecuniary effect on the owner as a permanent deprivation.

The third situation, described in subsection (4)(C), applies to the person who temporarily takes money or other property, which he then uses under circumstances that subject it to a substantial risk of loss. An example is the bookkeeper who borrows funds from his employer to place a bet on what he considers a "sure thing."

Obtain:

"Obtain" is defined with respect to both property and services in subsection (5). Since the definition includes a parting with either the property or an interest therein, technical distinctions based on whether the transferor intended to transfer title as well as the property itself are irrelevant. The alternative of a "purported transfer" is used to ensure applicability to

a transfer which, as a matter of law, is void.

Property:

Property is defined to include all types of personal property. As under former law, real property cannot be the subject of theft. However, realty that has been severed — as, e.g., crops, timber, or fixtures — does constitute property for purposes of the chapter, thus preserving the coverage of such former statutes as Ark. Stat. Ann. §§ 41-3905 (severing produce from soil or materials from buildings); 41-3910 (realty converted into personalty); 41-3911 (realty severed at the time of taking); 41-4222 (Repl. 1964) (taking logs, timber and other property).

Property of Another Person:

Property is deemed to be that of another when a person other than the actor has either a possessory or a proprietary interest in the property. This definition eliminates any doubt as to whether a partner or co-tenant can steal from another person having an interest in the same property. It also rejects the common law emphasis on right to possession of property as opposed to title to property. The notion that larceny was a crime against possession rather than title necessitated the development of other offenses, such as embezzlement and larceny by a bailee, to cover the situation where a person entrusted with the care of another's property appropriated it to his own use. The expanded definition of "property of another," together with the substantive definition of theft of property (§ 5-36-103), makes it possible to subsume the traditional offenses of larceny, embezzlement, and larceny by bailee under a single offense. See, § 5-36-103 and Commentary thereto.

The definition of "property of another" is qualified so as to clearly exclude property subject to a security interest. The practical effect is that the debtor who fraudulently sells property subject to a security interest commits the offense of defrauding secured creditors (§ 5-37-203) rather than theft of property (§ 5-36-103).

Services:

"Services" is defined by example in subsection (8) to include labor, accommodations, meals, transportation or utilities, all of which are not property but are

nonetheless commonly provided by the seller in expectation of payment.

Threat:

The Code replaces such offenses as blackmail and extortion by incorporating into the offenses of theft of property and theft of services those situations where the victim is coerced into transferring property. Subsection (9) enumerates the particular harms that must be threatened in order to constitute theft of property or services. At least some restriction on the meaning of "threat" in this context is desirable since to prohibit the obtaining of property or services by a threat of any type would criminalize a good many of the bargaining techniques ordinarily tolerated in a commercial context. On the other hand, to limit the definition to threats of unlawful acts would not reach the actor who demanded payment for doing what he was free to do or already obligated to do. See, *M.P.C. § 206.3, Comment at 75 (Tent. Draft No. 2, 1954)*.

The introductory clause to subsection (9) indicates that a threat may be expressed or may be implied from the conduct of the actor. It also clearly encompasses oral communications, thus closing a sizeable loophole in the earlier statute, which punished only written threats. See former law previously codified as Ark. Stat. Ann. § 41-4002 (Repl. 1964).

Threats of the type listed in subsections (9)(A)(i)-(iii) were specifically included in the prior offense of blackmail. See, former law previously codified as § 41-4002, *supra* ("threatening to accuse any person of a crime, or to do any injury to the person or property of another"). Obtaining property by threatening injury to a person is closely related to the offense robbery as defined in Chapter 12. The distinction between the two offenses is that robbery requires the threat of *immediate* physical force. Preservation of this distinction is important since robbery, under most circumstances, is punished more severely than theft of property by threat.

Subsection (9)(A)(iv)-(v) cover threats to defame. By expressly including such threats, the Code avoids strained efforts to construe a defamatory statement as an accusation of a crime within the scope of subsection (9)(A)(i). The fact that the actor would have a defense to a civil action for defamation because the statement is true

or privileged does not affect the criminality of his conduct in this context. Although the state cannot constitutionally restrict the right of the actor to speak under these circumstances, it can certainly penalize him for demanding money for forbearing to speak.

Subsection (9)(A)(vi) applies to the public servant who uses his position as leverage to extract money or other property. Under pre-existing law such conduct constituted extortion. See, Ark. Stat. Ann. §§ 12-1738, 1739 (Repl. 1968). There is some overlap between theft by threatening to take or withhold official action and the offense of public servant bribery (§ 5-52-103) and soliciting unlawful compensation (§ 5-52-104). Subsection (9), and by reference the offenses of theft of property (§ 5-36-103) and theft of services (§ 5-36-104), applies only if the element of intimidation is present.

The threat to provide or withhold testimony described in subsection (9)(A)(vii) is likewise closely related to witness bribery (§ 5-53-108). Again the distinguishing characteristic is that a threat implies an element of intimidation.

Subsection (9)(A)(viii), dealing with the threat of various forms of collective action, is careful to exclude the legitimate bargaining sanctions available to a union or other interest group. It applies only when the actor uses the threat of collective action for personal gain rather than for the benefit of the group for whom he acts. An example of proscribed conduct is the union leader who threatens to call a strike unless he receives a private payoff.

Since it is impossible to draft an exhaustive list of the types of coercion that should constitute a threat, subsection (9)(A)(ix) sets out a catchall provision that encompasses threats to engage in conduct that will not independently benefit the actor but are designed solely to induce another to part with money or property. The Model Penal Code lists the following examples of situations falling within these criteria that would not constitute a threat under the other paragraphs of subsection (9):

“(a) the foreman in a manufacturing plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) a close friend of the purchasing agent of a great corporation obtains

money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere; (c) a professor obtains property from a student by threatening to give him a failing grade.” *M.P.C. § 206.3, Comment at 79 (Tent. Draft No. 2, 1954).*

The final paragraph, subsection (9)(B), qualifies the definition of threat so as to exclude various types of coercive conduct to bring about a transfer of money or other property to which the actor in good faith believes he is lawfully entitled.

Value:

As was generally true of the former offense of larceny, the primary grading criterion of this chapter is the value of the property or services stolen. Section 5-37-101(8), which is patterned after Vern. Tex. Code Ann. § 32.02 (Repl. 1974), is designed to supplement former law by establishing standards facilitating the valuation of property and services.

For most forms of property likely to be the object of theft, the only logical valuation standard is “market value.” Therefore, it is not surprising to discover that most cases dealing with the issue speak in terms of “market value.” See, e.g., *Johnson v. State*, 255 Ark. 33, 498 S.W.2d 651 (1973); *Rogers v. State*, 248 Ark. 696, 453 S.W.2d 393 (1970); *Hammond v. State*, 232 Ark. 692, 340 S.W.2d 280 (1960).

Looking to market price is also the most obvious way to determine the value of services. The necessity for such a determination has not heretofore arisen in Arkansas since the scattered and narrowly drawn statutes that previously covered theft of services did not draw distinctions based on value. See prior law formerly codified as Ark. Stat. Ann. §§ 41-1908 et seq., 41-2905, 41-4236 (Repl. 1964).

Occasionally, stolen property has no readily ascertainable market value. In such cases, several alternative standards could be used to arrive at the value of the property — e.g., the benefit derived by the thief, the property’s original cost to the owner, or the cost to the owner of replacing the property. Subsection (11)(A)(ii) adopts the latter test since it is logically the owner’s present interest in the property that the law seeks to protect. The Supreme Court opted for one of the former valuations in one of the few cases in which the issue has arisen. In *Cowan v. State*,

171 Ark. 1018, 287 S.W. 201 (1926), a defendant charged with stealing license plates argued that the value of the plates was \$1, the cost to the owner of replacing them. The court upheld a grand larceny conviction after finding that the value of the plates was \$16, their cost to the owner and the price defendant would have had to pay to legally obtain them.

There was earlier statutory authority as to valuation of written instruments alleged to have been stolen. See former law previously found at Ark. Stat. Ann. § 41-3906 (Repl. 1964). This statute was construed only infrequently, but the cases indicate that, insofar as subsection (11)'s

definition of value addresses written instruments, the Code formulation follows pre-existing Arkansas law. See, *Pierce v. State*, 248 Ark. 204, 451 S.W.2d 219 (1970) (question of value of stolen, forged, and cashed money orders is question for jury); and *Gazaway v. State*, 215 Ark. 921, 224 S.W. 2d 28 (1949) (held that value of promissory note is its face value, irrespective of insolvency of debtor).

The alternative valuation for written instruments other than evidence of a debt is directed at other valuable documents such as manuscripts, maps, computer programs, etc.

1988 Supplementary Commentary to § 5-36-101

Amendments

Act 934 of 1987 added the language found at subsection (iv) of (11)(A). The amendment permits a subjective assessment of "value." The language of the definition is incorporated in § 5-36-103(b)(4)(B).

The Court will almost certainly interpret subsection (11)(A)(iv) as applicable only in § 5-36-103(b)(4)(B) cases. Permitting property to be valued along subjective lines under other subsections (e.g. § 5-36-106 (theft by receiving)) at the whim of victims would produce chaos. A subjective valuation system would give rise to unpredictability from the standpoint of defendants. Theft of an item of little value to the thief — for example, a purse containing a handwritten letter from a deceased spouse or child and having incalculable value to the owner — might result in a class B felony liability, since grading of thefts is geared to the detriment to the owner, not the benefit to the thief.

How it is to be determined that an item has "no market value or replacement cost" is not disclosed. Evidently, this language was intended to cover situations where the market value of an item is zero, though the item is valuable to the owner, in addition to circumstances in which it is impossible to arrive at a market value.

Article, Copy, Trade Secret

There have been no significant developments regarding the definitions of these terms since the enactment of the Code.

Deception

The next to last sentence of the defini-

tion of "deception" precludes any inferences of deception based solely on the failure to perform a promise. At least three Court of Appeals decisions involve the application of the sentence. In *Wiley v. State*, 268 Ark. 552, 594 S.W.2d 57 (Ct. App. 1980), the defendant obtained lumber and other building materials from a supplier based on the representation that he intended to use the materials to construct a house on property inherited from his grandfather. The defendant did not pay for the materials and did not use them to construct a house. Although the prosecution contended that the defendant had sold the materials, the evidence failed to indicate the disposition of the materials. The Court of Appeals invoked (3)(B) and held that the mere failure to perform the promised act did not create an inference of deception. It noted that had the prosecution shown that the defendant sold the materials the conviction would have been sustained.

Cates v. State, 267 Ark. 726, 589 S.W.2d 598 (Ct. App. 1979) presented the familiar factual pattern of the contractor who converts funds received from a homeowner to his own use rather than using them to pay materialmen and laborers, and to discharge liens. The Court of Appeals reversed the conviction since the only evidence to support the trial court's conclusion that the contractor did not intend to discharge the liens when he received the funds was his subsequent failure to pay off the liens. The result is consistent with numerous pre-Code deci-

sions holding that a contractor is not criminally liable for failure to discharge liens absent a showing of fraud.

The final case involving the penultimate sentence in the definition of deception is the most troublesome. In *Hixson v. State*, 266 Ark. 778, 587 S.W.2d 70 (Ct. App. 1979), *cert. denied*, 444 U.S. 1079 (1980), the defendant was convicted of theft by deception based on evidence that he had obtained money from the members of certain churches by promising to photograph the individual church members and deliver the photographs to the individual members and a membership directory to the churches. In spite of evidence that the defendant delivered most of the photographs to individual church members and made an "effort" to deliver the directories to the churches, a majority of the court found the evidence sufficient to sustain a conviction:

The evidence is crystal clear that the representations and promises made by appellant to deliver the church directories, which was an intricate part of the entire project and was the sole motivating factor that induced the churches and the membership to participate in the project, were false as a matter of fact and as to the value of the articles that the churches and members were to receive in return for delivering their monies to the appellant. Moreover, it is plain from this record that appellant had no experience or expertise in photography or in the compilation of church directories; and that at the time that appellant made the promises to deliver the directories, appellant did not possess the facilities to print a directory, nor had he made arrangements with any other firm or source for the preparation of the directories. The evidence establishes clearly that the appellant made use of the funds received for purposes other than for what was promised by appellant.

266 Ark. at 786, 587 S.W.2d at 74. The defendant was charged with theft from the membership of only three churches, but evidence was introduced of similar experiences by the membership of thirteen other churches. The court may have been influenced on the issue of intent by this evidence. The dissent argued that the only substantial evidence of deception was the defendant's failure to perform a prom-

ise, a circumstance that was not sufficient in itself to show deception. After his petition for certiorari was denied, the defendant sought review by writ of habeas corpus in the federal courts. In *Hixon v. Housewright*, 642 F.2d 243 (8th Cir. 1981). The Eighth Circuit concluded that:

Based on his history of having never delivered the directories and having never paid anyone to print them, which was essential to perform appellant's promise, it would be reasonable for a rational trier of fact to conclude that appellant never intended to perform and could not have reasonably believed he would perform.

642 F.2d 245.

Deprive

According to the original commentary to § 5-36-101, the definition of "deprive" set out in subsection (4)(C) is designed to reach situations where a person temporarily takes money or other property, which he then uses under circumstances that subject it to a substantial risk of loss. An example, according to the commentary, would be the bookkeeper who borrows funds to make a bet on a "sure thing." The availability of an "I only borrowed it" defense is unclear as a result of language of the Court of Appeals in *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982). In concluding that a defendant charged with burglary was entitled to an instruction on the lesser included offense of criminal trespass, the Court stated:

Where one takes the property of another without his permission but with the present intention of returning it or of paying the owner for it later, he is not guilty of theft Of course this rule is restricted to the borrowing of such items as are readily replaceable by a person who has the power to restore or replace them. 6 Ark. App. at 107, 639 S.W.2d at 73.

The defendant's contention in *Bongfeldt* was that he intended to pay for the property taken (gasoline) at the time of the taking. Although the Court did not purport to be construing the definition of "deprive," the quoted language may be cited in the future as judicial gloss on the definition that does appear in subsection (4).

Obtain

There has been no significant developments regarding the definition of this term since the enactment of the Code.

Property

There has been no significant developments regarding the definition of this term since the enactment of the Code.

Property of Another Person

There has been no significant developments regarding the definition of this term since the enactment of the Code.

Services

There has been no significant developments regarding the definition of this term since the enactment of the Code.

Threat

There has been no significant developments regarding the definition of this term as related to theft offenses since the enactment of the Code.

Value

A surprising number of cases handed down since the enactment of the Code have addressed the proof necessary to show the value of stolen property. Since the primary criterion for grading pre-Code theft offenses was likewise the value of the property taken, proof of value problems are not new.

The rules regarding proof of value that seem to be emerging from the opinions issued since 1976 are as follows. Clearly, the preferred method of showing value is by expert testimony. *Terry v. State*, 271 Ark. 715, 610 S.W.2d 272 (Ct. App. 1981). If expert testimony is not available, the State may rely upon testimony by the owner as to the purchase price of the property provided the date of purchase is not too remote. *Jones v. State*, 6 Ark. App. 7, 636 S.W.2d 880 (1982) (price paid for rings seven and ten years before theft not too remote); *Terry v. State*, *supra*; *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Riley v. State*, 267 Ark. 916, 593 S.W.2d 45 (Ct. App. 1979) (price paid for lawnmower some four years before theft too remote); *Cannon v. State*, 265 Ark. 270, 578 S.W.2d 20 (1979) (testimony of owner that she paid \$148 for automobile in 1966 insufficient to support finding that automobile was valued in excess of \$100 in 1978). Although the defendant's testimony is not always available, the state

may also rely on it to establish the price he paid for stolen property. *Morrow v. State*, 271 Ark. 806, 610 S.W.2d 878, *cert. denied*, 454 U.S. 819 (1981). A finding of value may be based on the owner's opinion as to the value. *Ply v. State*, 270 Ark. 554, 606 S.W.2d 556 (1980) (owner's opinion of value of coin collection based on receipts, cancelled checks, and reading books, magazines, and digests); *Watson v. State*, 271 Ark. 661, 609 S.W.2d 673 (Ct. App. 1980) (basis of owner's opinion not stated); *Bailey v. State*, 266 Ark. 200, 583 S.W.2d 15 (1979) (owner's opinion as to value of hubcaps based on cost of replacing two hubcaps on same automobile about one year prior to theft). But the owner's opinion will not be sufficient when based on an appraisal by a third party who is not called to testify. *Hughes v. State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981). Also insufficient is testimony based on price tags attached to the stolen property. *Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978). But see *Boone v. State*, 264 Ark. 169, 568 S.W.2d 229 (1978) (conviction affirmed where no objection made to witness reciting value of property as reflected on attached price tag). These cases suggest that defense counsel would be well advised to probe the basis for any opinion testimony as to the value, particularly that offered by the owner of the property.

The dissenting opinion in *Hixson v. State*, *supra*, raised an interesting valuation question. As explained above, the defendant in *Hixson* entered into contracts with churches to take photographs of their membership. In return for the churches' assistance in soliciting their membership to purchase photographs, the defendant agreed to supply photographic directories to the churches free of charge. The dissent argued that the value applicable for grading purposes was not the total amount of money received by the defendant but the value of the services performed by the churches in getting their membership together for photographic sessions. Alternatively, the dissent argued that the amount of money received by the defendant should have been offset by the value of any photographs which the defendant did actually provide to the membership. Although not cited by the dissent, the last sentence of the definition of value supports the latter argument.

See AMCI 2201.

Original Commentary to § 5-36-102

One of the major reforms of this chapter is the merging of all crimes dealing with the wrongful acquisition of property or services into a single, comprehensive offense. It is hoped that making theft a single offense, regardless of the manner in which it occurs, will reduce the needless wrangling at both trial and appellate levels over whether particular conduct that is obviously criminal constitutes one offense rather than another.

Denominating all larcenous conduct defined by this chapter as one offense has two procedural consequences. One is that an indictment or information need only charge the defendant with "theft" and specify additional information, such as the subject matter and victim of the theft, sufficient to fairly apprise the defendant of the case against him. The prosecutor need not commit himself to a particular manner of theft, as was often the case under prior law where he had to elect to proceed under a specific statute. Thus the defendant cannot escape conviction of one offense by proving he is actually guilty of another, a danger that the legislature previously recognized to a limited degree in the area of theft. See, former law previously found at Ark. Stat. Ann. § 41-1903 (Repl. 1964) (Defendant may be convicted of larceny on indictment for obtaining property by false pretense or false token). The prejudice or surprise, if any, occasioned by a change in the state's theory of the case can always be corrected by granting defendant a continuance.

The second procedural consequence of denominating the conduct in this chapter a single offense is that the wrongful appropriation of particular property constitutes only one offense even though the defendant's conduct may fall within more than one section. This is especially important since the applicability of the respective sections has intentionally been made overlapping to ensure comprehensive coverage. For example, the person who knowingly sells stolen property violates § 5-36-103 ("makes an unauthorized transfer of an interest in the property of another with intent to deprive the owner thereof") and § 5-36-106 ("disposes of stolen property of

another person, knowing that it was stolen"). It would be a perversion of justice to convict him of two offenses for such conduct.

Subsection (b) restates the essence of the shoplifting presumption that formerly appeared as Ark. Stat. Ann. § 41-3942 (Supp. 1973). The earlier statute contained an additional refinement. After setting out the presumption stated in subsection (b), § 41-3942 went on to provide that "the finding of such unpurchased goods or merchandise concealed upon the person . . . shall be prima facie evidence of willful concealment." All the additional language did was allow the state to prove willful concealment by showing actual concealment, a result the court would probably reach even in the absence of such language. Any possible procedural benefit it conferred on the state could not possibly compensate for the confusion it engendered in the minds of courts and juries. See, e.g., *Safeway Stores, Inc. v. Gross*, 206 Ark. 205, 398 S.W. 2d 669 (1966) (reversing judgment due to misleading instruction based on § 41-3942).

It should also be observed that in accordance with the general principles discussed in the Commentary to subsection (a), *supra*, there is no longer a separate offense denominated "shoplifting." Compare prior law formerly codified as Ark. Stat. Ann. § 41-3939 (Repl. 1964). Such conduct is now treated as merely another form of theft. Accordingly, the language of the presumption is congruent with § 5-36-103 (theft of property). See, § 5-36-103(a)(1): "knowingly takes . . . the property of another person with intent to deprive the owner thereof."

Subsection (c) permits the state to total for purposes of grading the value of all property stolen pursuant to one scheme or course of conduct. For example, the con artist who swindles twenty people out of \$50 each is not permitted to escape felony liability because no single theft exceeds \$100. Likewise, the embezzler who regularly speculates a small amount over a period of time is judged in the light of his total defalcation.

1988 Supplementary Commentary to § 5-36-102*Consolidation of Theft Offenses*

The original commentary to this section expressed the hope that consolidation of all crimes involving theft into a single offense, regardless of the manner in which the theft occurred, would eliminate wrangling over whether conduct that was obviously criminal constituted one offense rather than another. This hope seems to have been fulfilled in the cases arising to date under the chapter on theft. In *State v. Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978), *cert. denied*, 441 U.S. 964 (1979), the Supreme Court recognized the consolidation of the former offenses of receiving stolen goods [Ark. Stat. Ann. § 41-3934 (Repl. 1964)] and possession of stolen goods [Ark. Stat. Ann. § 41-3938 (Repl. 1964)] into the offense of theft. See, also, *Smith v. State*, 264 Ark. 874, 575 S.W.2d 677 (1979). The second sentence of § 5-36-102(a), which permits conviction of theft upon evidence that a theft was committed in any manner that would be theft under the chapter regardless of the manner specified in the indictment or information, was considered in *Prokos v. State*, 266 Ark. 50, 582 S.W.2d 36 (1979). The defendant allegedly failed to deliver certain chemicals and other materials after having sold the victim an exclusive chemical products distributorship for the sum of \$15,000. The information charged the defendant with theft by taking unauthorized control over property with a value in excess of \$10,000. After the prosecution rested its case, the defense moved for a directed verdict on the grounds that no evidence had been introduced to show that the defendant had taken property in the manner charged in the information. The trial judge agreed that the evidence did not demonstrate a theft by unauthorized taking, but allowed the prosecutor to amend the charge to allege theft by deception. On appeal the Supreme Court agreed that it was not error to permit the State to amend the charge after resting its case. It held, however, that the Court should have granted a continuance under the circumstances since the change in the charge was of sufficient significance to possibly prejudice the conduct of the defense. The record reflected full compliance by the prosecution with all defense motions for

discovery, but the Court refused to validate the procedure of the trial court on this ground since the record did not show that the nature and extent of discovery were sufficient to apprise the defendant that he was charged with theft by deception rather than theft by unauthorized taking.

Not so fortunate was the defendant in *Martin v. State*, 272 Ark. 376, 614 S.W.2d 512 (1981). The information charged him with theft of property from A. Tenenbaum Company, Inc. The evidence showed that he had cashed counterfeit checks drawn on A. Tenenbaum Company, Inc., and that the bank which had cashed the checks reccredited the account of A. Tenenbaum Company, Inc. on discovering the forgeries. The defendant argued that the information was defective since the property allegedly taken was not that of A. Tenenbaum Company, Inc. The Supreme Court had little trouble concluding that the variation between the information and the proof went only to the manner in which the theft was committed and that the defendant was not prejudiced by lack of notice.

In *Tate v. State*, 269 Ark. 687, 600 S.W.2d 915 (Ct. App. 1980) the defendant was alleged to have received payroll overpayments totaling \$430.00 resulting from changes in payroll time slips by persons unknown. He was originally charged with theft of property in violation of § 5-36-103. At the close of evidence, and over the objection of the defendant, the court instructed the jury that if it had a reasonable doubt as to the defendant's guilt of theft of property by taking unauthorized control under § 5-36-103, it could consider whether he was guilty of theft of property delivered by mistake under § 5-36-105. The Court of Appeals reversed the conviction on the grounds that § 5-36-103 and § 5-36-105 defined separate offenses with distinct elements. Although the fact situation seems tailor made for application of § 5-36-102, there is no mention of the section in the opinion. A better line of reasoning would have been to hold that a charge of theft of property by unauthorized taking can be supported by evidence of theft of property received by mistake. The court should then have considered

whether changing the gift of the offense after the conclusion of testimony was prejudicial to the defendant. Compare the Supreme Court opinion in *Prokos v. State*, discussed above.

Shoplifting Presumption

The shoplifting presumption set out in § 5-36-102 has been incorporated into § 5-36-116, which establishes a defense to a civil action against a law enforcement officer or merchant who detains for a reasonable time and in a reasonable manner a person engaging in conduct that gives rise to the presumption. The Supreme Court has held that the statutory presumption created by § 5-36-102(b) justifies submission of the question of intent to the jury only if a reasonable juror could on the evidence *as a whole* find the requisite intent beyond a reasonable doubt. *Smith v. State*, *supra* (conviction set aside when

defendant who had concealed a pack of cigarettes on her person in a supermarket placed cigarettes in shopping cart of a companion before being accused of trying to take the cigarettes.) *Smith v. State*, *supra*, as well as *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979), make it clear that the prosecution need not rely on the shoplifting presumption to show an intent to deprive the owner of property and that any evidence from which such an intent may be inferred will be sufficient to support a conviction of theft of property.

See AMCI 2203 to 2203-P.

Amount of Theft

Cases addressing the value of property involved in a theft are discussed in the supplementary commentary to § 5-36-101.

See AMCI 2201.

Original Commentary to § 5-36-103

This section consolidates the inordinate number of offenses dealing with the unlawful acquisition of property. Although the section was suggested by provisions in several recently revised criminal codes, its final form approximates § 1732 of the Proposed New Federal Criminal Code (1971).

Theft of property, as defined in this section, consists of the wrongful appropriation of the property of another with the purpose to deprive the owner thereof. Wrongful appropriation occurs when the actor (1) takes or exercises unauthorized control over the property; (2) makes an unauthorized transfer of an interest in the property; (3) obtains the property by deception; or (4) obtains the property by threat.

"Takes unauthorized control" replaces the confusing variety of terms used to describe the many offenses under former law that fell under the general heading of larceny — e.g., stealing, carrying away, leading away, riding away, driving away, removing away.

"Exercises unauthorized control" is directed at the bailee who lawfully takes control of the property, but subsequently appropriates it to his own use. Use of the phrase obviates any need for a statute defining embezzlement as an offense distinct from other types of theft. See, prior

law formerly codified as Ark. Stat. Ann. §§ 41-3920 (use of public funds by public officers); 41-3921 (borrowing public funds); 41-3925 (executors, administrators, and guardians embezzling or converting); 41-3927 (clerks, apprentices, servants, employees, agents or attorneys — embezzling); 41-3928 (embezzlement of unissued or undelivered funds); 41-3929 (bailees — embezzlement) (Repl. 1964). "Exercises unauthorized control" must be read in conjunction with "purpose of depriving the owner thereof." A deviation from the terms of a bailment is theft only if done with the requisite purpose to deprive the bailor. The term "unauthorized control" precludes conviction of the person who assumes or exercises control with the owner's consent. The degree of control sufficient to constitute the offense will vary depending on the nature of the property and the usual means of exerting control over such property. In particular, the Code eliminates undue emphasis on common law concepts such as "caption" and "asportation." See, e.g., *Rogers v. State*, 250 Ark. 68, 464 S.W. 2d 56 (1970). As stated in the Model Penal Code commentary, "[C]aption, in the sense of undisputed physical control, and 'asportation,' i.e., removal of the object from its former location, are not requisites of appropriation. These are but circumstances

to be considered along with all others relevant to the ultimate issue whether the behavior of the actor constituted a negation or usurpation of the owner's dominion." *M.P.C. § 206.1, Comment at 65 (Tent. Draft No. 1, 1953)*.

The inclusion in the definition of the offense of "makes an unauthorized transfer of an interest in property" is designed to reach the actor who sells property he does not own. Obviously, in a great many cases, the person who makes an unauthorized transfer will also take or exercise unauthorized control over the property first. However, it is conceivable that a person could fraudulently convey property without ever assuming control. See, e.g., *Ridgel v. State*, 110 Ark. 606, 162 S.W. 773 (1914), where the court reversed a larceny conviction based on the unauthorized sale of a cow because defendant did not himself "asport" the animal. As elsewhere in this section, technical distinctions as to whether the actor is lawfully in possession of the property he sells are irrelevant. Thus the language applies to the actor who sells property entrusted to his care as well as the actor who sells the property of the stranger. It should also be noted that the person who makes an unauthorized transfer of property in return for consideration may commit theft under subsection (a)(1) as to the property he transfers and theft under (a)(2) as to the property he receives.

The language "obtains the property of another by deception" is broad enough to cover most forms of conduct traditionally labelled false pretense. See, generally, earlier law previously codified as Ark. Stat. Ann., tit. 41, ch. 19 (Repl. 1964) (Supp. 1973); §§ 41-2351 to 2374 (Crim. Code 1976). The substantive scope of the language turns on the meaning of deception. The term is defined in § 5-36-101, and its relation to the present concept of "false pretense" is explored in the commentary thereto.

Obtaining property by threat was previously punishable, under certain circumstances, as blackmail or extortion. See prior law formerly codified as Ark. Stat. Ann. § 41-4002 (Repl. 1964). See, also, § 12-1738 (Repl. 1968). The comprehensive scope of theft by threat can best be understood by examining the definition of threat in § 5-36-101 and the commentary thereto.

Regardless of the fashion in which appropriation occurs, it must be accomplished with "the purpose to deprive the owner thereof." Though this restates the common law larceny requirement that has long been followed in Arkansas, *Fulton v. State*, 13 Ark. 168 (1852), the definition of "deprive," as explained in the commentary to § 5-36-101, has been considerably expanded and is now satisfied by something less than permanent deprivation. The section also alters the traditional rule with respect to when the actor must form the intent to deprive. At common law and under former Arkansas authority the intent to deprive had to exist at the time of the taking. See, e.g., *Gilcoat v. State*, 155 Ark. 455, 244 S.W. 723 (1922). A subsequently formed intent to deprive the owner did not make larcenous an initially innocent taking. However, appropriation under the proposed offense can occur not only by taking unauthorized control but also by exercising unauthorized control or making an unauthorized transfer. Therefore, the actor whose initial acquisition of property is not theft because the purpose to deprive is absent nonetheless commits theft if he subsequently makes an unauthorized transfer that is accompanied by the requisite purpose to deprive.

The grading of the offense theft of property is based on several factors. As under old law, the primary consideration is the value of the property stolen. The traditional distinction between grand and petit larceny has been raised from \$35 to \$100 in recognition of the effects of inflation on property values since 1949, when the former amount was adopted. Felonious theft has been further divided into two categories. Providing higher penalties for thefts of property valued at more than \$2,500, applied in conjunction with the aggregation of value provision in § 5-36-102(c), permits more severe treatment of the professional thief. Since theft by threat involves the additional element of intimidation of the victim, such thefts are made felonies regardless of the value of the property taken. Firearms and credit cards are also singled out for special treatment regardless of their value since such items almost inevitably end up in illicit channels where they are used to commit additional offenses.

It should be noted that Act 360 of 1977 amended § 5-36-103(b) to reduce the

value grading criterion distinguishing class B from class C felonies from \$10,000 to \$2,500. Also, subsection (b)(2)(C) was amended by addition of the language “val-

ued at less than \$2,500” in order to eliminate the argument that theft of a firearm with a value in excess of \$2,500 is nonetheless a class C felony.

1988 Supplementary Commentary to § 5-36-103

Amendments

Subsection (b)(4)(B) has been added. See commentary to § 5-36-101.

Original Commentary to § 5-36-104

Since, traditionally, only “property” could be the subject of larceny, the law was forced to develop new offenses to deal with the person who wrongfully secured the performance of services. As in most other jurisdictions, the approach in Arkansas was ad hoc and the resulting coverage fragmentary. Prior authority consisted of a number of offenses directed at the fraudulent obtaining of particular services. See, *e.g.*, earlier authority formerly codified as Ark. Stat. Ann. §§ 41-1908 (hotels, motels, resorts, eating places); 41-1910 (Repl. 1964) (hospital or sanitarium); 41-1956 (Supp. 1973) (telecommunications); 41-4236 (Repl. 1964) (electric power). See, also, § 41-3655 (Crim. Code 1976) (natural gas), formerly codified as § 41-2910 (Repl. 1964).

The offense theft of services provides comprehensive coverage in this area. As defined in § 5-36-101, “services” includes virtually anything other than property that is normally provided in expectation of compensation. Section 5-36-104 also contemplates several methods of theft — *i.e.*, by deception or threat, as those terms are defined in § 5-36-101, or by the expansively phrased alternative, “other means to avoid payment.” Subsection (a)(2) is

directed at a rarer method of theft — where the actor diverts services under his control to the benefit of himself or another. It would apply, for example, to a foreman who uses employees under his supervision on personal projects or a computer programmer who steals computer time from his employer.

Criminal liability attaches only if the actor obtains or diverts services “with purpose to defraud.” Thus, he must have the wrongful intent to avoid payment at the time the services are performed. The person who in good faith accepts the benefit of services for which he plans to pay later cannot be convicted of theft even though he subsequently decides not to recompense the provider of the services.

The presumption created by subsection (b) is similar to provisions appearing in earlier statutes. See prior authority formerly found at Ark. Stat. Ann. §§ 41-1909, 1911 (Repl. 1964).

In conformity with the propositions that all sections of this chapter define a single offense, subsection (c)(1), as amended by Act 360 of 1977, establishes a grading scheme which parallels that of § 5-36-103.

1988 Supplementary Commentary to § 5-36-104

The only significant development regarding this section since the enactment of the Code has been the increase of the

line between felony and misdemeanor theft from \$100 to \$200.

See AMCI 2204, 2204-P.

Original Commentary to § 5-36-105

At common law, a person who found and retained lost property was guilty of larceny if he knew or had reasonable means of ascertaining the identity of the owner of

the property and, at the moment of taking, he had the intent to deprive the owner thereof. The subsequent formation of a dishonest purpose would not retroactively

cause the initial appropriation to constitute larceny. See, 2 Wharton, Criminal Law § 459 (Anderson ed. 1957); *M.P.C. § 206.5, Comment at 83* (*Tent. Draft No. 2, 1954*). Prior to enactment of the Code, in the few cases in which the issue arose, Arkansas followed the common law rule. See *Brewer v. State*, 93 Ark. 479, 125 S.W. 127 (1910); *Penny v. State*, 109 Ark. 343, 159 S.W. 1127 (1913). The problem with the traditional formulation is that determination of an actor's state of mind at the time of the appropriation is in most cases a purely speculative exercise. As stated in the Comment to the Model Penal Code provision on which § 41-2205 is based: "The realistic objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner." *M.P.C. § 206.5, Comment at 84* (*Tent. Draft No. 2, 1954*). Accordingly, the gist of the offense is now the failure to undertake reasonable efforts to restore the property to the rightful owner. A purpose to deprive is relevant only insofar as it must be the motivation for the failure to restore. Since the actor's state of mind at the time of the original taking is no longer the determinative factor, he could be convicted on the basis of a subsequently formed fraudulent intent. Contrarywise, the person who initially takes a lost article with a larcenous intent is not guilty under this section if he later makes reasonable and timely efforts to return the article.

The duty to undertake restoration efforts arises only if the actor assumes control of the property and knows it to be lost. Therefore, the person who casually examines a lost item without taking control, or who assumes control with the honest belief that the property is abandoned does not commit an offense.

In applying the same principles to lost property and mislaid property, the section again departs from traditional doctrine. A distinction was drawn at common law between lost property, which had been unintentionally left in the place where found, and misplaced property which had been intentionally placed at the spot where found but then forgotten by the owner. Since mislaid property was deemed to be in the "constructive possession" of the true owner, the finder who appropriated the property with the intent to deprive the owner committed larceny even if the actor did not know and could

not reasonably ascertain the identity of the true owner. Furthermore, the property was still treated as in the constructive possession of the true owner, even after appropriation; therefore, the finder could be convicted of larceny on the basis of a subsequently formed fraudulent intent. See, *M.P.C. § 206.5, Comment at 84, 85* (*Tent. Draft No. 2, 1954*); 2 Wharton, Criminal Law § 461 (Anderson ed. 1957). It was difficult for the finder of property as well as the court to determine whether property was lost or merely mislaid. Moreover, the distinction between lost and mislaid property was relevant only because of the artificial common law emphasis on who was in possession of property at the time of appropriation. Under the Code, "possession" is no longer a relevant factor in distinguishing various theft offenses. Accordingly, § 5-36-105 treats theft of mislaid property in the same fashion as theft of lost property.

Section 5-36-105 also applies the rules discussed above to cases of mistaken delivery, an area of law which was not satisfactorily addressed by previous Arkansas authority. The language used is broad enough to cover several situations — property delivered to the wrong person, an overpayment of property, or the unintentional transfer of property concealed in other property. If the error is attributable to the deception of the recipient, he is guilty of theft of property pursuant to § 5-36-103. However, even if the recipient is in no way responsible for the mistake, he still commits an offense under this section if he discovers the mistake and, in order to appropriate the property to his own use, fails to take reasonable measures to restore the property to its rightful owner. The section does not require the return of property delivered under a mistake as to its value; therefore, it is not an offense to purchase an article at a bargain price even though the purchaser is aware that the seller is ignorant of the true value of what he sells.

Theft of property lost, mislaid, or delivered by mistake is graded less seriously than other forms of theft. As stated in the commentary to the analogous provision in the Proposed Michigan Code, the lesser punishment "acknowledges . . . the difference in attitude and degree of dangerousness between the individual who decides to take advantage of unexpected opportunity to capitalize on another's er-

ror or misfortune . . . and the one who deliberately preys on another's property."

Michigan Revised Criminal Code § 3215, *Commentary at 233 (Final Draft, 1967)*.

1988 Supplementary Commentary to § 5-36-105

See AMCI 2205, 2205-P.

Original Commentary to § 5-36-106

Although the offense of receiving stolen property probably has its origin in the difficulties at common law of convicting a "fence" of larceny or as an accessory thereto, contemporary statutes are usually justified on two grounds. First, by drying up the market in stolen goods, the law discourages theft itself. Secondly, the person found in knowing possession of stolen items can be convicted without the necessity of proving whether he took the property himself or acquired it from the actual thief. There were formerly a number of statutes that treated the receiver of stolen property in the same fashion as the thief. See, *e.g.*, prior law formerly found at Ark. Stat. Ann. § 41-3934 (Repl. 1964) (receiving stolen goods); § 41-3937 (Repl. 1964) (receiving stolen animals); § 41-3938 (Repl. 1964) (possession of stolen goods).

Section 5-36-106 adopts a definition of "receiving" that is broad enough to include not only the possession of stolen property, but also constructive possession, the acquisition of bare title to the property, or the extension of credit secured by the property.

The language "having good reason to believe it was stolen" is taken from § 129 of the Proposed Oregon Code. It relaxes somewhat the state's burden of proof by using an objective rather than subjective test to ascertain whether the actor was aware that the property was stolen. The jury need not find that the actor actually knew that the property was stolen; it is sufficient that he was on notice of facts that would lead a reasonable person to entertain such a belief. Although the old statutes all spoke in terms of "knowing" conduct, the Supreme Court has stated:

"Absolute knowledge that the goods have been stolen is not necessary; a belief on the part of the accused, caused by the facts and circumstances, may be enough." *King v. State*, 194 Ark. 157, 159, 106 S.W.2d 582, 583 (1937) *quoting* Underhill, Criminal Evidence § 527 (4th ed.).

Another change from prior law is elimination of a "purpose to deprive the owner thereof" as an element of the offense. This was done because inquiry into the actor's state of mind at the time he receives the property, beyond whether he knew the property to be stolen, is irrelevant and unnecessary. The only justification for knowingly purchasing stolen property is the intent of the purchaser to return the property to the rightful owner. This justification is acknowledged in subsection (c), which provides the actor a defense under such circumstances.

Subsection (c) creates a presumption that a person knows property is stolen in two situations. The first, when he is found in unexplained possession of recently stolen property, restates earlier law. See, *Bridges v. State*, 176 Ark. 756, 9 S.W.2d 240 (1928). The second is innovative. It arises when a person acquires property for a price he knows to be far below its value.

Subsection (e), as amended by Act 360 of 1977, adopts for grading purposes the diacritical monetary amounts of §§ 5-36-103, 104. Subsection (e)(2)(C) was also added by Act 360. It makes theft by receiving a firearm at least a class C felony, regardless of the weapon's value. Such indiscriminate treatment of both credit cards and firearms is amply justified by the need to deter trafficking in such stolen property.

1988 Supplementary Commentary to § 5-36-106

See AMCI 2206, 2206-P.

Original Commentary to § 5-36-107

Section 5-36-107 is essentially former Ark. Stat. Ann. § 41-3950 (Supp. 1973). Under old law, theft of a trade secret was defined so as to require an "intent to deprive or withhold from the owner thereof the control of a trade secret, or ... an intent to appropriate a trade secret to

[the actor's] own use or to the use of another." In view of the exceedingly broad definition of "deprive" in the first section of this chapter, the description of the specific intent required to commit theft of a trade secret has been abbreviated and simplified.

Original Commentary to § 5-36-108

Singling out for special treatment the unauthorized use of vehicles, as distinguished from the unauthorized use of other chattels, is justified by the inherent mobility of vehicles, the greater value of vehicles as compared with other chattels likely to be temporarily appropriated, and the increased likelihood of damage to the person or property of another should a vehicle come into the hands of an inexperienced operator. Unauthorized use of a vehicle was previously punishable under former Ark. Stat. Ann. § 41-3919 (Repl. 1964) (riding another's horse, mule, or vehicle). See, also, § 75-170 (Repl. 1957) (unlawful taking of vehicle); and § 75-194 (Repl. 1957) (use of motor vehicle without owner's consent).

The Code offense is not coextensive in scope with earlier law. For example, § 5-36-108 does not cover the use of a horse or

mule without the owner's consent. This omission is based on the absence of the circumstances that distinguish vehicles from other chattels as well as recognition of the fact that horses and mules are no longer a common mode of transportation. An unauthorized use of a horse or mule, which substantially inconveniences the animal's owner, would nevertheless constitute criminal mischief in the second degree. See, § 5-38-204.

The section is broader than former law insofar as it applies to the unauthorized use of a boat or aircraft. Pre-existing "joy-riding" statutes, §§ 75-170 and 75-194, do not proscribe such conduct due to the restrictive definitions of "vehicle" and "motor vehicle" in the Motor Vehicle Act. See, Ark. Stat. Ann. § 75-102(a) and (b); *Weber v. State*, 250 Ark. 566, 466 S.W.2d 257 (1971).

Original Commentary to § 5-37-101

Section 5-37-101 provides definitions of terms central to Chapter 37's provisions.

The definition of "coin machine," set out at § 5-37-101(1) is drawn from New York Penal Law § 175.50(1) and is phrased broadly enough to describe any device vending merchandise, currency, or services.

Section 5-37-101(2), defining "credit card," is patterned after former law previously codified as Ark. Stat. Ann. § 41-1965(b) (Supp. 1973). The definition includes cards with which money can be obtained from automatic currency dispensing devices presently in use at many banks.

The definition of "deception" appearing

at subsection (3) is identical to that found at § 5-36-101(3) (Definitions — Theft). For an explanation as to the operation of the term, see the Commentary to § 5-36-101(3).

"Enterprise" is given expansive definition and embraces such things as churches, unions, and clubs as well as corporate or individual businesses, whether public or private.

The definition of "financial institution" is modeled after M.P.C. § 223.0(2) and Vern. Tex. Code Ann. § 32.01(1) (Repl. 1974) and originally ended with the phrase "or collective investment." This language was deleted by the House Judiciary Committee in order to exclude from

the ambit of § 5-37-206 (receiving deposits in a failing financial institution) sales of securities or other tangible evidence of corporate indebtedness. Transactions involving such transfers will continue to be governed by Chapters 42 and 43 of Title 12 of the Arkansas Code.

The definition of "slug" is drawn from Proposed Kentucky Code § 1700(9) and Proposed Michigan Code § 4050(2). Although there was heretofore Arkansas statutory authority prohibiting manufacture and use of slugs, there was no statutory definition as such. See prior authority formerly codified as Ark. Stat. Ann. § 41-1912, 1913 (Repl. 1964).

"Utter" is given its common meaning by subsection (7). The term includes attempted as well as successful delivery.

For discussion of the term "value," see the Commentary to § 5-36-101(11).

The definition of "written instrument" is patterned after Proposed Michigan Code § 4001(a) and Proposed Kentucky Code § 1700(1). Within its ambit are included such items as deeds, wills, negotiable instruments, contracts, postage stamps, currency, securities, bonds, stocks, trademarks, seals, tokens, and identification and credit cards.

1988 Supplementary Commentary to § 5-37-101

See AMCI 2301.

Original Commentary to § 5-37-201

Former Arkansas statutory authority on forgery was antiquated, the most recent legislation in old Chapter 20 of Title 41 being an 1871 enactment (Ark. Stat. Ann. § 41-1815 (Repl. 1964)). The Code redefines forgery with simplicity and precision, consolidating the numerous offenses under former law into a single offense and logically structuring forgery into differently graded degrees.

It should be mentioned at the outset that although it might have been possible to have dealt with conduct previously denominated "forgery" as fraud, forgery was retained as a distinct offense "partly because the concept is . . . embedded in statute and popular understanding . . . , and partly in recognition of the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce, and of perpetrating large scale frauds." *M.P.C. § 223.1, Comment at 80 (Tent. Draft No. 11, 1960)*.

Subsection (a) defines forgery of a written instrument. The gravamen of the offense is treatment of a written instrument so that as drawn, altered, etc., it appears to be the act of someone not authorizing that act. A forged document is to be distinguished from a genuine one bearing false recitals on its face. See, *State v. Adcox*, 171 Ark. 510, 286 S.W. 880 (1926). Subsection (a) follows prior Arkansas law

in making unauthorized conduct with a purpose to defraud the essential elements of the offense. See, *Van Horne v. State*, 5 Ark. 349 (1843); *Rickman v. State*, 135 Ark. 298, 205 S.W. 711 (1918). No counterpart existed in former statutory law which merely prohibited "forgery," "tendering," "passing," or "uttering" coins (former § 41-1801), public securities and warrants (former § 41-1802), deeds, wills, bonds, promissory notes, etc. (former § 41-1803), and the like. A purpose to defraud assumes an intent to prejudice the rights of a party other than the actor. Accordingly, the language "to the prejudice of another man's right," so frequently appearing in the cases (see, *Van Horne* and *Rickman*, *supra*), is not included in subsection (a).

Under old law forgery, uttering forged instruments, and possession of forged instruments were separate offenses. See prior law formerly codified as Ark. Stat. Ann. §§ 41-1806, 41-1811 (Repl. 1964); *Rice v. State*, 241 Ark. 570, 408 S.W.2d 902 (1966); and *Keese v. State*, 223 Ark. 261, 265 S.W.2d 542 (1954). The Code defines forgery in terms of "uttering" and "possession" and, as a consequence, separate convictions for each kind of conduct with respect to the same instrument are not authorized. This changes Arkansas law, but not unreasonably so. If forgery and possession of forged instruments are

viewed as preparatory offenses consummated by uttering, there appears to be no more justification for permitting multiple convictions for forgery, possession, and uttering of the same instrument than for allowing conviction for an attempt to commit a crime and the consummated crime.

Subsection (b), defining forgery in the first degree, singles out for special treatment the forgery of easily negotiated instruments typically drawn on issuers with impeccable financial reputations. Because such instruments are readily accepted at

face value, their forgery is more difficult and usually requires careful planning and sophisticated equipment. Prior law also imposed stronger sanctions for forging instruments of this type. See prior law formerly found at Ark. Stat. Ann. §§ 41-1801, 41-1817 (Repl. 1964).

Subsection (c) defines forgery in the second degree and is concerned with forgery of deeds, wills, contracts, commercial instruments, credit cards, and documents purporting to be filable with or issued from a public office.

1988 Supplementary Commentary to § 5-37-201

Sufficiency of Evidence

In *Mayes v. State*, 264 Ark. 283, 571 S.W.2d 420 (1978), the Court, advertent to the original commentary and noting that "this statute brings our law into harmony with case law on the subject in other jurisdictions," *Id.* at 293, 571 S.W.2d at 426, pointed out that under the Code the crime of forgery is much broader than under former law. It now includes not only forgery but also uttering and possession of a forged instrument. Accordingly, the Court concluded that the evidence supported a conviction of forgery committed by "uttering" and possession of a forged instrument. *Id.* at 289-91, 571 S.W.2d at 424. See §§ 5-37-101(7), 5-37-101(9), 5-37-201(a), (c). The Court also found that the term "written instrument" (§ 5-37-101(9)) was not limited in meaning to "any paper, document, or other material containing written or printed matter or its equivalent. . .," but was expanded by the remaining language of its definition.

In *Mayes*, appellant was found to have delivered an unsigned check made payable to "Phillip Watson" and endorsed in this name to West Department Stores in an attempt to purchase merchandise. There was apparently no evidence presented on who endorsed the check. The Court, in affirming the conviction of forgery, relied heavily on the proof that appellant Mayes was not Phillip Watson and that he left the store without the check being honored or returned to him. The Court found that appellant committed forgery by "uttering" an instrument purporting to be the act of a person — here, a fictitious person — who did not authorize the act. *Id.* at 290, 571 S.W.2d at 424-25.

Subsequently, in *Askew v. State*, 280 Ark. 304, 657 S.W.2d 540 (1983), the Court reversed the conviction of appellant on grounds that the State had simply not shown that he had forged a check or uttered a forged instrument. Appellant was convicted upon proof that, representing himself to be Archie Shirley, he had purchased merchandise with checks drawn on the account of "Cash for Cans" made payable to the order of Archie Shirley, Jr. and bearing the signatures of Jerry R. Pate and James J. Pate as makers. There was no testimony that the latter names were forged or that the signatures were in fact "unauthorized," though the bank had returned them with the notation "unauthorized signature."

It is difficult to reconcile the results in *Mayes* and *Askew*, particularly because in *Mayes* the Court found that, because appellant was not the named payee, Phillip Watson, an inference justifying a finding that the instrument was forged arose. The *Askew* Court focused attention not on the identity of the appellant but instead on the prosecution's failure to prove that any signatures were unauthorized. But *Askew* apparently holds that in prosecutions for check forgery it is at a minimum necessary for the State to show that the checks bore unauthorized or forged signatures. See also, *Robinson v. State*, 10 Ark. App. 441, 664 S.W.2d 905 (1984).

Evidence that appellant negotiated an extensively altered check was found to provide sufficient evidence upon which to convict in *Faulkner v. State*, 16 Ark. App. 128, 697 S.W.2d 537 (1985).

Whether criminal simulation (§ 5-37-213) is a lesser included offense of forgery

is considered but not decided in *Lewis v. State*, 267 Ark. 933, 591 S.W.2d 687 (Ark. App. 1979).

See AMCI 2301 to 2302-A.

Original Commentary to § 5-37-202

This section is directed at falsification that is not within the definition of forgery since the entries are not required to be the acts of another person who did not authorize them. The section is based on Proposed Michigan Code § 4125 and is designed to prevent the intentional falsification of business records as a prelude to defrauding potential creditors, stock purchasers, and customers.

As might be expected, pre-existing stat-

utory authority on this subject was scattered throughout several titles. For example, see Ark. Stat. Ann. §§ 41-1819, 41-1820, 41-2815 to 41-2817, 41-4513, 41-4514, 41-4608, 41-4609 (Repl. 1964); 66-1819, 66-1820 (Repl. 1966); 67-707, 67-708, 67-864, 71-111 (Supp. 1973), 71-1105 (Repl. 1957), 71-1501.3 (Supp. 1973); 72-203, 72-205, 72-1023, 72-1031, 72-1215, 72-1222 (Repl. 1957). Other provisions were found in Titles 81 and 82.

1988 Supplementary Commentary to § 5-37-202

See AMCI 2303.

Original Commentary to § 5-37-203

A debtor does not commit theft under § 5-37-203 (theft of property) by disposing of property in which his creditor holds a security interest because property subject to a lien is not "property of another" within the meaning of § 5-37-203. See, § 5-36-101(7), and Commentary thereto. Secured creditors are protected by § 5-37-203, which prohibits various acts by debt-

ors calculated to hinder enforcement of liens.

Previously, the chief recourses of creditors with respect to defaulting debtors lay in civil remedies. Section 5-37-203 consolidates prior, fragmentary statutory law on the subject. See, e.g., prior law formerly found at Ark. Stat. Ann. §§ 41-1928, 1932, and 1933 (Repl. 1964).

1988 Supplementary Commentary to § 5-37-203

See AMCI 2304.

Original Commentary to § 5-37-204

Section 5-37-204 imposes criminal liability for certain activities calculated to frustrate proceedings initiated or contemplated for the protection of creditors. Analogous legislation is found in both federal and state law. See, 18 U.S.C.A. § 152 (1969); Ark. Stat. Ann. § 36-209 (Repl.

1962). See, also, Ark. Stat. Ann. § 67-706 (Repl. 1966). The offense can be committed in a number of ways and is predicated upon (1) a purpose to defraud and (2) knowledge that specified proceedings have been or are about to be instituted.

1988 Supplementary Commentary to § 5-37-204

See AMCI 2305.

Original Commentary to § 5-37-205

At the time of the Code's enactment, statutory authority dealing with offenses of this type was dispersed throughout several titles of the statutes. See, *e.g.*, former law previously found at Ark. Stat. Ann. §§ 41-1906 (Repl. 1964); 41-1966 (Supp. 1973). See, also, 67-707, 67-708, 67-864, 67-865 (Repl. 1966); 71-608 (Repl. 1957).

Section 5-37-205 simplifies and consolidates the law. Subsection (a)(1) is directed at the source of a fraudulent misstate-

ment; subsection (a)(2) applies to an accountant or other person whose attestation bolsters its credibility. Should property actually be obtained by means of the statement, liability for theft by deception would arise. It should be noted that the provision does not have overlapping application with respect to § 5-37-201 (forgery) because the document itself is what it purports to be; liability springs from material inaccuracies appearing in the statement.

1988 Supplementary Commentary to § 5-37-205

See AMCI 2306.

Original Commentary to § 5-37-206

Section 5-37-206 is drawn from M.P.C. § 224.12 and had a statutory counterpart in prior law formerly codified as Ark. Stat. Ann. § 67-712 (Repl. 1966). The aim of all is protection of unwary depositors.

Insofar as liability is restricted to "officer[s], manager[s], or other person[s] participating in the direction of a financial institution," the section is more restrictive than old § 67-712, whose provisions also spoke to "cashiers" and "employees." "Li-

bility is limited to managerial personnel on the theory that the criminal law should not place the burden on tellers and clerks to suspend operations of a financial institution." *M.P.C. § 206.23, Comment at 119 (Tent. Draft No. 2, 1954)*. On the other hand, the coverage of the section is broader insofar as its application extends to all "financial institutions," thus applying to savings and loan associations as well as banks.

1988 Supplementary Commentary to § 5-37-206

See AMCI 2307.

Original Commentary to § 5-37-207

Offenses involving credit cards were formerly set out as Ark. Stat. Ann. §§ 41-1965 to -1977 (Supp. 1973). These provisions defined a variety of offenses such as making false statements to procure issuance of credit cards (§ 41-1966); credit card theft or forgery (§ 41-1967); defrauding an issuer or cardholder (§ 41-1968, 41-1969); and completion of incomplete cards by one other than the cardholder (§ 41-1970). This complex and lengthy statutory scheme is superseded by the provisions of the chapters on fraud and theft, which have the twin virtues of simplicity and breadth of application. For Code provisions see, *e.g.*, § 5-37-101(2) (defining "credit card"); § 5-37-101(9) (defining "written instrument" as to include

credit cards); § 5-37-201 (forgery) (encompassing forgery or completion of a credit card); § 5-37-205 (false financial statement) (encompassing false statements as to financial condition to secure issuance of a credit card); and § 5-36-103 (theft of property) (encompassing theft of credit card).

Section 5-37-207 is limited to fraudulent use of a credit card to obtain property or services — conduct previously within the ambit of old §§ 41-1968, 41-1974. The section is, in substance, M.P.C. § 224.6. It imposes liability for conduct not constituting theft of either property or services since the supplier incurs no loss. Rather, as is pointed out in a comment to M.P.C.

§ 224.6, it is the issuer or cardholder who suffers damage by such transactions.

"This is a new section to fill a gap in the law relating to false pretense and fraudulent practices. Sections [5-36-103] and [5-36-104] cover theft of property or services by deception. It is doubtful whether they reach the credit card situation because the user of a stolen or cancelled credit card does not obtain goods by any deception practiced upon or victimizing the seller. The seller will collect from the issuer of the credit card, because credit card issuers assume the risk of misuse of cards in order to encourage sellers to honor the cards readily. Thus it is the nondeceived issuer who is the victim of the practice." *M.P.C. § 224.6, Proposed Official Draft at 179 (1962).*

The possibility that a merchant may

provide property or services to another who he knows is using a forged credit card was specifically addressed by prior law. See, former § 41-1969 (defrauding of issuer or cardholder by persons authorized to furnish money, goods, services, or anything of value). Under the Code, the merchant is an accomplice to fraudulent use of credit card if he has the purpose to facilitate commission of the offense. See, § 5-2-403. He also commits forgery by forwarding the credit card sales slip to the issuer for reimbursement since he knows that the signature on the slip is not that of authorized person. See, § 5-37-201.

Grading of the offense is accomplished by subsection (b), which in form and substance closely parallels earlier law found at §§ 41-1969, 41-1974 (Supp. 1975).

Original Commentary to § 5-37-208

This section is designed to reach two situations which are not adequately covered by the other offenses in Chapters 36 and 37. The first is when the actor's misrepresentation does not lead to a transfer of property or services, thus precluding a conviction for theft by deception. See, § 5-36-103. The second situation is when the other party actually transfers valuable consideration to the actor. Although the other party is in part motivated by the actor's misrepresentation, this does not constitute theft by deception unless the misrepresentation has pecuniary significance. See the definition of deception in § 5-36-101(3). Criminal liability is im-

posed in the latter situation, not to protect the other party, but rather to preserve the public image of the organization or individual whom the actor purports to represent.

The type of conduct prohibited by § 5-37-208 was covered by an array of pre-existing statutes including, probably, the former general "false pretense" statute, Ark. Stat. Ann. § 41-1901 (Repl. 1964). See, also, prior law previously codified as Ark. Stat. Ann. §§ 41-1905, 41-1944, 41-1945, 41-1949, (Repl. 1964). Additionally, see § 41-2360 (Repl. 1977), formerly codified as § 41-1951.

1988 Supplementary Commentary to § 5-37-208

See AMCI 2310.

Original Commentary to § 5-37-209

Section 5-37-209 is designed to reach forgery in its inchoate stages by penalizing the possession of counterfeiting tools and equipment, check printers, and other devices designed for forgery or adaptable to that use. Since there are legitimate uses of such devices, possession is

criminalized only if the actor planned to use the device to commit forgery or furnish the device to another for that use. Former law was for the most part superannuated and prolix. See, prior law formerly found at Ark. Stat. Ann. § 41-1812 (Repl. 1964).

1988 Supplementary Commentary to § 5-37-209

See AMCI 2312.

Original Commentary to § 5-37-210

Section 5-37-210 takes up conduct not constituting forgery because the written instrument involved is what it appears to be: a document executed by an authorized person whose signature appears thereon. Use of the previously defined terms “deception” and “written instrument” (§ 5-37-101 (9)) permit a succinct statement of the elements of the defense. As is the case

with other provisions of Chapter 37, this section strikes at preparatory conduct, the ultimate aim of which is generally theft or fraud of some sort. Arkansas law on the subject was previously found at Ark. Stat. Ann. § 41-1901 (Repl. 1964). See, also, *State v. Bond*, 151 Ark. 203, 235 S.W. 801 (1921).

1988 Supplementary Commentary to § 5-37-210

See AMCI 2313.

Original Commentary to § 5-37-211

This section is required as a companion section to § 5-37-203 because a judgment creditor does not become a “secured creditor” with respect to real property until the judgment is rendered or with respect to personal property until execution is placed in the hands of the appropriate officer. See, Ark. Stat. Ann. § 29-130 (Repl. 1962); § 30-116 (Repl. 1962); § 85-

9-104(L) (Supp. 1973). Consequently, § 5-37-211 is necessary to protect creditors against debtors who secrete or otherwise dispose of property prior to the time a lien attaches. Protection is initiated at the earliest feasible time by providing that the debtor need only have knowledge that civil proceedings “have been or are about to be instituted.”

1988 Supplementary Commentary to § 5-37-211

See AMCI 2314.

Original Commentary to § 5-37-212

Prior statutory authority on this topic was located at Ark. Stat. Ann. §§ 41-1912 to -1914 (Repl. 1964). It prohibited operation or attempted operation of vending machines with slugs or other coin-like articles. Also penalized was the manufacture or sale of slugs, although mere possession was apparently not prohibited. Additionally, it was unclear whether the statute’s proscription was broad enough to cover fraudulent acquisition of paper currency from banking devices previously alluded to. See, Commentary to § 41-2301(1). All violations of previous law were misdemeanors.

Section 5-37-212 defines the offense of “unlawfully using slugs.” Section 5-37-

101’s initial broad definitions of “slug” and “coin machine” allow restatement and supplementation of prior law with brevity and simplicity. One commits an offense under § 5-37-212 by use of slugs in a “coin machine” with the purpose to defraud. Under subsection (a)(2) manufacture, possession, or any disposition of a slug with a purpose to enable any person to violate subsection (a)(1) is also a violation.

Grading is accomplished by looking to the value of the property obtained or the slugs used, manufactured, possessed or disposed of. The diacritical amount — one hundred dollars — is the same as that used to separate felonies and misdemeanors for purposes of grading theft.

1988 Supplementary Commentary to § 5-37-212

See AMCI 2309, 2309-P.

Original Commentary to § 5-37-213

Section 5-37-213, like other provisions of Chapter 37, is cast in generic terms, eliminating the necessity for a proliferation of statutes aimed at the same general type of fraudulent activity. It is derived from M.P.C. § 224.2; New York Penal Law § 170.45; and Proposed Oregon Code § 157. The offense is directed at the preparatory stages of theft by deception. It is designed to cover the fraudulent simulation of "objects" that are not written instruments within the definition of § 5-37-101(9). Such "objects" include antiques, paintings, and other objects d'art, as well as more common articles. It should also be observed that the section's prohibition ex-

tends to "injurious" conduct such as marketing under a competitor's name products known to be defective with the purpose of damaging the competitor's trade reputation.

Statutory authority of a similar nature was found throughout Chapter 19 of former Title 41 of the Arkansas statutes. See, *e.g.*, prior law formerly codified as Ark. Stat. Ann. §§ 41-1915 (silverware — use of brand "sterling"); 41-1918 (liquid fuels and lubricating oils — adulterating and misbranding); 41-1940 (falsely advertising "pit barbecue"); and 41-1953 (monument, rock or stone business — false advertisement).

1988 Supplementary Commentary to § 5-37-213

See AMCI 2311, 2311-P.

Original Commentary to § 5-37-214

Section 5-37-214 enables the state to aggregate for grading purposes under §§ 5-37-212, 213 all frauds committed pursuant to a single scheme or course of conduct. Aggregation is permitted since

the offenses defined by these sections frequently take the form of repeated violations against numerous victims with no single violation involving sufficient property to generate felony liability.

1988 Supplementary Commentary to § 5-37-214

See AMCI 2308, 2308-P.

Original Commentary to § 5-38-101

Section 5-38-101 defines key terms of Chapter 19.

"Occupiable structure," as defined by § 5-38-101(1), embraces specially cherished structures, the destruction of which usually entails a risk of physical injury or substantial inconvenience. Actual presence of a person is not required. The definition encompasses not only real property but temporary structures and even vehicles, if used for one of the purposes specified in subsections (1)(A)-(C). Consequently, a tent or camper may under certain circumstances, be an "occupiable structure." The last sentence brings

within the ambit of the definition each room of a hotel or apartment house and each individual store in a shopping center composed of adjoining buildings.

The definition of "property" is broad enough to bring within its scope everything susceptible to destruction through means made criminal by Chapter 38.

"Property of another person" is defined by § 5-38-101(3) so as to contemplate either proprietary or possessory property interests. It includes the interests of lessors, lessees, partners, and co-tenants.

The definition of "vital public facility" introduces a new term of art into the Code

and Arkansas law as does the definition of "catastrophe." The definitions of these terms are self-explanatory. Their func-

tions will be discussed in relation to the provisions in which they appear.

1988 Supplementary Commentary to § 5-38-101

See AMCI 1901.

Original Commentary to § 5-38-202

This provision, which is based on M.P.C. § 220.2, has no counterpart in former statutory law. It recognizes that fire and explosion are not the only forces that may cause widespread injury to persons or property unless carefully controlled. Although the section sets out these alternative forces with particularity, the listing is not exclusive. Instead, the specific enumeration is designed to aid courts and juries by giving content to the phrase "other dangerous and difficult to confine force or substance."

The concept of widespread injury to person or property is incorporated into the

offense by the term "catastrophe." Subsection 5-38-101(5) defines "catastrophe" in the alternative as (1) death or serious physical injury to ten or more persons, or (2) substantial damage to ten or more occupiable structures, or (3) property damage in excess of a half million dollars. Although the perpetrator of a catastrophe may also be guilty of multiple counts of murder, battery, arson, or criminal mischief, the substantial amount of human suffering that he has caused justifies an offense that ensures he is subject to the most severe penalty, short of death, prescribed by the Code.

1988 Supplementary Commentary to § 5-38-202

Amendments

This section was amended by Acts 689 and 815 of 1983. The offense was elevated to a Class Y felony. See §§ 5-1-106 and 5-4-401 (Supp. 1983).

Section 5-38-202(b)(1) was added to

punish extortion. Compare §§ 5-36-103(a)(2) and 5-36-103(b)(1)(B) (obtaining property by threat); § 5-71-210 (communicating false alarm); § 5-71-211 (threatening fire or bombing).

See AMCI 1905.

1988 Supplementary Commentary to § 5-38-203

Amendments

Section 2 of Act 544 of 1981 amended § 5-38-203 by substituting the language now set out as § 5-38-203(a). This subsection is exceedingly broad: it prohibits one from destroying or damaging his own property "without legal justification." If "justification" is used as a term of art, the phrase "without legal justification" is meaningless since no provision of subchapter 6 of chapter 5 (Justification), without distortion of plain meaning and legislative intent, gives the phrase content as it applies to destruction of one's own property. If "justification" is used in common parlance, the term's use is nonetheless odd: one commonly does not think of disposal of one's garbage, for instance, as something done with "legal justification."

Amendatory legislation (Acts 544 and 671 of 1981) enacted by the same session of the General Assembly seems to have given rise to codification problems here. Section 2 of Act 544 amended § 41-1906(1) [5-38-203(a)] to read:

(1) A person commits the offense of criminal mischief in the first degree if he purposely and without legal justification destroys or causes damage to any property, whether his own or that of another.

Subsequently, Section 1 of Act 671 amended §§ 41-1906(1)-(4) [5-38-203] to read:

(1) A person commits the offense of criminal mischief in the first degree if he purposely destroys or causes damage to:

(a) any property of another; or

(b) any property, whether his own or that of another person, for the purpose of collecting any insurance therefor.

(2) In actions under this Section involving cutting and removing timber from the property of another, the failure to obtain the survey as required by Section 1 of Act 45 of 1885 (Ark. Stat. 54-201) shall create a presumption of wilful intent to commit the offense of criminal mischief in the first degree.

(3) Criminal mischief is a class C felony if the amount of actual damage is \$500 or more. Otherwise, it is a class A misdemeanor.

(4) In actions under this Section involving cutting and removing timber from the property of another, there shall be imposed, in addition to the penalty in Subsection (3), a fine of not more than two times the value of the timber destroyed or damaged; provided, however, that in addition to the above, the Court can require the defendant to make restitution to the owner of the timber."

Act 671 of 1981 thus provided a comprehensive revision of Ark. Stat. Ann. § 41-1906 [5-38-203] without reference to the Act 544 amendment. The compiler has drawn subsections 41-1901(2)-(4) [5-38-203(b)-(d)] from Act 671. But the version of § 41-1906(1) [5-38-203(a)] provided by

Act 544 has been retained at the expense of the version found in Act 671, even though Act 671 was, of course, subsequently enacted legislation. Retention of the Act 544 version was required to make § 41-1906 [5-38-203] track in language and concept the changes made to § 5-38-301 (arson). If Act 671 had been deemed to supersede Act 544 completely, the revised arson statute (at § 5-38-301(a)(2)) and the revised criminal mischief statute (at § 5-38-203(a)(2)) would have defined identical conduct as two separate offenses.

See AMCI 1906, 1906-P.

Criminal Mischief: Proof Necessary for Conviction

The defendant in *Bray v. State*, 12 Ark. App. 53, 670 S.W.2d 822 (1984) was convicted of criminal mischief in the first degree for burning a mattress owned by a halfway house where she lived. The evidence at trial was that she confessed that she had burned the mattress. On appeal the conviction was reversed by the Court of Appeals which held that, after removing her confession from consideration, the evidence was insufficient to demonstrate the required purposeful culpable mental state. It is unclear why the Court did not simply find that one is presumed to intend the natural results of his conduct.

Original Commentary to § 5-38-204

Sections 5-38-203, -204 are broadly drawn to embrace a generic form of conduct — damage or destruction of property. The provisions, therefore, reached burning of property that was no longer arson because of the restrictive definition originally given that offense in the 1975 version of the Code by § 5-38-301. They also made possible the consolidation of a multiplicity of pre-existing statutes directed at the destruction or damaging of particular types of property. Most of the latter were found in Chapters 5 and 42 of Title 41. The remainder were scattered throughout the title. See, e.g., former Ark. Stat. Ann. §§ 41-404, 41-407; 41-507, 41-

508; 41-2101, 41-2104, 41-2105, 41-2117; 41-2901, 41-2904; 41-3301, 41-3312; 41-4205, 41-4207 (Supp. 1973), 41-4210 — 41-4214, 41-4218, 41-4220, 41-4221, 41-4226, 41-4227, 41-4230, 41-4231, 41-4235, 41-4236, 41-4238, 41-4239, 41-4241, 41-4246 (Supp. 1973); and 41-4402 (Supp. 1973), 41-4406 — 41-4408, 41-4410, 41-4420 (Supp. 1973). Many of these have been repealed by Act 928 of 1975; others remain in force, either wholly or partially.

The grading criterion of § 5-38-203(2) was lowered by Act 360 of 1977 from \$1000 to \$500. Actual damage of less than \$500 still results in class A misdemeanor liability.

1988 Supplementary Commentary to § 5-38-204

See AMCI 1907, 1907-P.

Original Commentary to § 5-38-205

A number of earlier statutes prohibited interfering with, damaging, or destroying the property of public facilities. See, *e.g.*, statutes previously codified as Ark. Stat. Ann. §§ 41-508(3); 41-2904; 41-3312; 41-4230, 41-4231, 41-4235, 41-4236 (Repl. 1964); 41-4240, 41-4246 (Supp. 1973). See, also, § 41-4056 (Supp. 1973), formerly codified as § 41-4406 (Repl. 1964).

Of course, not all "interruptions" fall afoul of this section. So, while cutting a

neighbor's telephone line out of spite "interrupts" the operation of a facility by means of damage to "property of another," this kind of impairment is clearly "insubstantial" and, consequently, outside the statute's scope. In other words, § 5-38-205 is not addressed to tampering of a trifling nature. Rather, it is concerned with behavior likely to cause danger to the public or widespread inconvenience or alarm.

Original Commentary to § 5-38-301

The Commission's approach to this topic was influenced by these introductory comments of the Model Penal Code Commentary:

"1. *Arson; Background and Rationale.* The common law felony of arson was defined as willful and malicious burning of another's dwelling or adjacent structures. A vast legislative development of the offense has brought us to the point in some states that burning of almost any property is denominated arson of some degree or is punishable with greater severity than if the property were damaged or destroyed by means other than fire. Statutory arson is commonly divided into three degrees according to the type of property burned. Special concern for dwellings continues to manifest itself in classification of arson of dwellings and related structures as first degree arson with maximum penalties of 20 years or more. Second degree arson commonly embraces the burning of other buildings and structures, and sometimes vehicles. Third degree arson is likely to cover burning of any other property of another of the value of \$25 or more. Burning property of any character to defraud insurers is made punishable by a separate section, applicable to one's own property, with intermediate penalties.

"This scheme was embodied in a Model Arson Law proposed many years ago by the National Board of Fire Underwriters, and widely adopted in whole or part. It is subject to grave criticism on the ground that the system of classifying offenses is

arbitrary from the penological point of view. For example, the burning of any empty, isolated dwelling may lead to a 20-year sentence, while setting fire to a crowded church, theater or jail is a lesser offense. The destruction of a large dam, factory, or public service facility is regarded less seriously than destruction of a private garage on the grounds of a suburban home. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers, as a special category of crime apart from risks associated with burning. Thus, to destroy a valuable painting or a manuscript by burning it in a hearth or furnace cannot be distinguished criminologically from any other method of destruction.

"Even more absurd are the common provisions, antedating the Underwriter's Model Act, establishing penalties equivalent to third degree arson, for burning crops, timber, or other designated class of personal property, however small in amount. For example, in Alabama the statutory sentence is 1 to 5 years for setting fire to a shock of corn or a "pile" of straw, grass or lumber; but setting fire to a pile of coal or tank of gasoline worth less than \$25 apparently is not punishable at all. In California, burning a pile of coal or a tank of gasoline would be third degree arson carrying a maximum imprisonment up to three years, but burning a pile of "potatoes, or beans, or vegetables, or produce, or fruit of any kind, whether sacked,

boxed, crated, or not, or any fence . . ." can result in imprisonment up to 10 years. It appears to be immaterial whether the "pile" of vegetables is on the farm, in the truck or store of the city merchant, or indeed in the possession of the consumer. A disgruntled employee of the grocer who set fire to several crates of vegetables would thus be subject to more than three times the penalty applicable if he had chosen canned goods, or wrapping paper. It should also be noted that this vegetable burner would be subject in California to the same penalties as if he had burned a church, school, warehouse, or bridge, and to higher penalties than if he had burned a ship or stolen the vegetables or thrown them in the garbage." *M.P.C. § 220.1, Comment at 34-36 (Tent. Draft No. 11, 1960).*

Former law embodied some of the questionable approaches illustrated by the Model Penal Code Comment. See, e.g., prior authority formerly Ark. Stat. Ann. §§ 41-503 (Repl. 1964) (burning of any personal property of another); § 41-505 (Repl. 1964) (felony liability for burning of haystack, regardless of its value). Consequently, the original 1975 revision took the form of narrowing the offense of arson to destruction of property by fire or explosion under circumstances that create a risk of death or serious physical injury to a person, or substantial inconvenience to the public at large. The Commission perceived no reason why, in the absence of these aggravating circumstances, destruction of property by fire or explosion should be treated any differently from destruction by other means. This approach was later abandoned. See § 5-38-301 (Supp. 1987) and supplementary commentary.

In addition, it should be observed that § 5-38-301 defines an inchoate offense. No actual damage to property must be established. The seriousness of the offense is such that the Commission felt that the penalty for an attempt should be equal to that imposed for the completed crime. In this regard the section, for practical purposes, conforms to prior law. See, prior law formerly codified as Ark. Stat. Ann. § 41-504 (Repl. 1964) (attempt to burn). *Cf., Bennett & Holiman v. State*, 201 Ark. 237, 243, 144 S.W.2d 476, 479 (1940).

Subsection (a)(1) applies the statute's prohibition to occupiable structures belonging to another. Since "occupiable

structure" is defined in terms of buildings or vehicles likely to contain persons, the provision presumes that their destruction by fire or explosion endangers human life or limb. To the extent that the term "occupiable structure" applies to vehicles, the section is broader than the earlier Arkansas statute defining arson. See, prior law formerly found at Ark. Stat. Ann. § 41-501 (Repl. 1964). However, it is more restrictive than § 41-501 in that it does not necessarily encompass "other houses" or "any improvement upon real estate." It is also more restrictive in scope than the several earlier statutes prohibiting "burning" various types of property. See, e.g., former law previously found at §§ 41-502, 41-503, 41-506; 41-4237 (Repl. 1964). See, also, §§ 5-38-310, -311 (1987).

Under the original 1975 version of the Code, it was necessary for the State to prove that the occupiable structure was the property of another person. Unlike under prior law, a person did not commit arson when he burned or exploded his own property, although such conduct led to criminal liability under § 5-38-302 (reckless burning) or § 5-38-203 (criminal mischief in first degree). More recent legislation recreates this liability under subsections (a)(2)-(3). In view of the expansive definition of "property of another," either the lessor or the lessee who burns rented property did fall within the purview of § 5-38-301.

Subsection (a)(3) has application to purposeful conduct designed to destroy by fire or explosion any property of another person — personality included — if the actor in doing so negligently creates a risk of serious physical injury to *any* person. Absent danger of physical injury to persons, however, burning of personal property was not treated differently than destruction by any other means in the original Code. This is no longer the case.

Finally, subsection (a)(4) was designed to prevent the substantial inconvenience to the general public, and in some circumstances, actual danger to public safety that is likely to result from the destruction of a vital public facility, as that term is defined by § 5-38-101(4).

By classifying arson as a B felony, the original Code doubled the maximum possible sentence of earlier law. The penalties have been considerably enhanced since enactment of the original Code.

1988 Supplementary Commentary to § 5-38-301

Amendments

As originally enacted, this section applied only to destruction of property belonging to a person other than the actor. § 41-1902 (Repl. 1977). Conduct which under prior law would have been arson aimed at defrauding an insurer was dealt with in § 41-1906 (Repl. 1977) (criminal mischief). Act 544 of 1981 substantially expanded the definition of the offense by including destruction of property owned by the actor for the purpose of collecting insurance or where the actor's conduct creates a risk of death or physical injury to any person.

Act 242 of 1987 added subsection (b) in its present form.

Section 5-38-301(a)(2) now gives rise to anomalous results sought to be avoided by the original form of § 41-1902. One who simply abandons an automobile valued at less than \$2,500, reports it stolen, and attempts to collect insurance commits theft by deception, a class C felony, under § 5-36-103. Burning the same vehicle for identical purposes exposes the actor to class B felony liability. § 5-38-301(b). Moreover, if the property that is the subject of theft by deception is valued at \$200 or less, the actor commits only a class A misdemeanor. If the same property is burned, even though no person or other property is endangered, the actor remains exposed to class B felony liability. § 5-38-301(a)(2) and (b). See original commentary to § 5-38-301.

In *Ellis v. State*, 4 Ark. App. 201, 628

S.W.2d 871 (1982), the Court upheld a conviction of conspiracy to commit arson. The offense charged was committed while the arson statute prohibited only the destruction of another's property. The defendant, who was the owner of the property in question, argued that he could not be convicted of conspiracy to commit an offense that he could not commit himself. The court held that it was no defense to a charge of conspiracy to commit arson under § 5-38-301 and § 5-3-401 that the defendant owned the property at issue, since § 5-3-401(1) speaks in terms of agreeing with another person or persons that "one or more of them" would commit the substantive offense. See, also, § 5-3-103(b)(5).

In *Riddick v. State*, 271 Ark. 203, 607 S.W.2d 671 (1980), the defendant was convicted of arson and argued on appeal that his conviction should be reversed because he committed the offense at the owner's request as his agent. Here, again, the offense charged was committed when the arson statute prohibited only destruction of another's property and appellant argued that, because the owner could not be convicted of arson, neither could his agent. The Court found that substantial evidence supported the jury's implicit finding that the owner did not make such a request.

See 1983 Supplementary Commentary to § 5-2-405 for further discussion of *Riddick*, *supra*.

See AMCI 1902.

Original Commentary to § 5-38-302

Authority somewhat analogous to § 5-38-302 was formerly found at Ark. Stat. Ann. §§ 41-507, 41-508 (Repl. 1964), now codified as §§ 5-38-310, -311. See, also, § 50-104 (Repl. 1971). Ark. Code Ann. § 5-38-310 is addressed mainly to situations where intentionally set fires are negligently allowed to spread and damage property of another. Subsections (a)(1) and (a)(4) of § 5-38-310 involve fires set on the property of another; subsection (a)(2) with fires on the property of the actor. Subsection (a)(3) covers both situations. The statute imposes misdemeanor liability in all cases. Section 5-38-310's

companion provision, § 5-38-311, imposes felony liability for the willful firing of another's land.

An offense is committed under § 5-38-302 when one purposely starts a fire or causes an explosion, and as a result, recklessly creates a risk of death or serious physical injury to another or actually destroys or damages an occupiable structure or a vital public facility. Whether the fire was started on one's own property or that of another is irrelevant; the provision is aimed at the described results. If the actor starts the fire recklessly rather than purposely, and actual damage to the property

of another ensues he is guilty of criminal mischief (§ 5-38-204) rather than reckless burning.

1988 Supplementary Commentary to § 5-38-302

See AMCI 1903.

Original Commentary to § 5-38-303

Section 5-38-303 is one of the few provisions of the Code imposing criminal responsibility for an omission to act. It creates liability for failure to take reasonable measures to put out a fire or to report it to appropriate authorities. Accountability is not related to the cause of the fire; the section's provisions speak to the public, not merely to the person starting the fire. The primary purpose of the provision is to

encourage the reporting of dangerous fires. Secondly, the section is aimed at the person who is present at the scene of a fire under suspicious circumstances and has failed to conform his conduct to the standard provided. The provision allows imposition of criminal responsibility for a lesser offense on a person whose conduct strongly indicates guilt of arson.

1988 Supplementary Commentary to § 5-38-303

See AMCI 1904.

Original Commentary to § 5-39-101

The terms defined by § 5-39-101 will be discussed in the context of the substantive provisions of this chapter.

1988 Supplementary Commentary to § 5-39-101

The only cases construing the definitions in this section are unexceptional.

Occupiable Structure

In *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977), the Court held that the student union building at a state university was an "occupiable structure." The building was clearly a structure "where people assemble for purposes of business, . . . education, religion, [and] entertainment" within the meaning of subsection (1)(B). The fact that no person was actually present at the time is irrelevant under the last sentence of the subsection.

Enter or Remain Unlawfully

In *Sims v. State*, 272 Ark. 308, 613 S.W.2d 820 (1981), the Court held, consistent with the third sentence of subsection (3), that a person did not have a license or privilege to enter a closed door marked "employees only" in a store otherwise open to the public.

Front Porch of House as "Open to The Public"

Appellant in *Campbell v. State*, 289 Ark. 454, 712 S.W.2d 302 (1986) accosted his 91-year-old victim on the front porch of her house, threw her to the floor, and began dragging her toward the front door. He was convicted of burglary. The Court reversed, finding that "the State did not prove an unlawful entry upon Ms. Johnston's front porch, for the statute permits an entry upon premises that are open to the public." *Id.* at 455, 712 S.W.2d at 303, citing § 41-2001(3) [§ 5-39-101(3)]. Subsection (3) provides: "'Enter or remain unlawfully' means to enter or remain in or upon premises when not licensed or privileged to do so. A person who enters or remains in or upon premises that are at the time open to the public, does so with license and privilege, regardless of his purpose, unless he defies a lawful order not to enter or remain personally communicated to him by the

owner of the premises” A front porch is apparently open to the public even though it is part of the curtilage and, perhaps, even though the property is fenced, although *Campbell* does not speak to the latter issue.

“Enter or Remain Unlawfully”: License Expires Upon Completion of Purpose

In *LeFlore v. State*, 17 Ark. App. 117, 704 S.W.2d 641 (1986), the Court of Appeals held that appellant “entered or remained unlawfully” the municipal court clerk’s office in the Sebastian County Courthouse in the course of opening a safe and taking its contents. Appellant argued that he was given the keys to the clerk’s office and thus did not enter it “unlawfully.” The evidence showed that he was given keys to the courthouse and the clerk’s office so that he could retrieve tools he claimed to have left there inadvertently. After entering the courthouse, he

took the money from the safe, got his tools, left the courthouse, and returned the keys. The Court of Appeals held that his license or privilege to go into one section of the courthouse for the purpose of retrieving tools did not license him to go to the clerk’s office to steal. The court then said, “His license or privilege ended when he completed or failed to complete the purpose for which his license was granted to enter the maintenance office.” 17 Ark. App. at 123, 704 S.W.2d at 645, citing *Sims v. State*, 272 Ark. 308, 613 S.W.2d 820 (1981) (non-employee defendant not licensed to enter room marked “employees only”). The court may have intended to intimate that one who lawfully enters an area for any specified purpose may be deemed to remain unlawfully in that area once the purpose for his original entry no longer exists, but its reliance on *Sims* (where this was not an issue) makes this unclear.

Original Commentary to § 5-39-201

At common law, the offense of burglary was defined most precisely and consisted of six components: (1) breaking and (2) entering, (3) at nighttime, (4) the dwelling, (5) of another, (6) with intent to commit a felony. This definition was, at least on its face, reasonable and useful in light of the narrowness of the common-law definition of “attempt,” the sanctity of the dwelling, and the danger and alarm likely to result from an invasion of premises under the described circumstances.

By a process of legislative accretion, the scope of the offense of burglary was expanded far beyond its common law limits. The former state of burglary legislation was perhaps partially explicable as an effort to compensate for the narrow scope of the common law respecting attempts. Every burglary is by hypothesis an attempt to commit some other crime. By making such conduct an independent substantive offense, the moment when the law may intervene was moved back. As an additional result, cumulative penalties could be imposed for entering with intent to steal and for stealing, although ordinarily an attempted offense merges into the completed offense. See, former authority previously found at Ark. Stat. Ann. § 41-1005 (Repl. 1964), specifically providing for the “stacking” of sentences in

the event that a person broke or entered in the nighttime and subsequently committed a felony. The need for an expansive definition of burglary has been eliminated, of course, by the comprehensive attempt statute found in Chapter 3.

The development of the offense of burglary in Arkansas followed a pattern fairly typical of that occurring in other jurisdictions. For example, under former Arkansas law, the elements “breaking” and “entering” were stated in the alternative, thus permitting a conviction upon proof that the actor either “broke” or “entered.” See, prior law formerly found at Ark. Stat. Ann. § 41-1001 (Repl. 1964). This change, together with the elimination of the requirement that the offense occur at nighttime, made it possible to convict of burglary the person who entered a store open to the public with the intent to shoplift, in effect causing the offense of burglary to completely swallow that of shoplifting. A more significant expansion of the scope of the offense resulted from adding to the list of structures that could be the subject of a burglary. In Arkansas, this list previously included not only a dwelling, but a “tenement, railroad car, automobile, airplane, or any other building, although not specially named herein, boat, vessel, or watercraft.”

Expansion of the boundaries of burglary resulted in serious anomalies in prosecution and punishment. It was possible to treat as burglary behavior that was distinguishable from theft only on purely insignificant grounds. For instance, entering a hen house to steal a chicken became a serious felony, while stealing a chicken at the hen house door was mere petit larceny. Taking a package from a car seat was punishable by 2 to 21 years. Stealing the car itself carried a penalty of 1 to 21 years.

The Commission felt that reform should take the direction of narrowing the compass of the offense so that it covers the distinctive situation for which it was originally devised: namely, the invasion of premises under circumstances likely to terrorize or pose a threat to the safety of persons. The purpose is to separate the concept of security of structures likely to contain persons from other concepts, such as attempt, which are adequately covered by other statutes.

The requirement of § 5-39-201 that the offender "enter or remain unlawfully" takes a middle ground between the common-law requirement of "breaking and entering" and the complete elimination of that requirement in some modern statutes. (See, California Penal Code § 459.) The provision speaks simply and directly to the core of the concept of "breaking and entering," namely intrusion without privilege. "Enter or remain unlawfully" is defined at § 5-39-101(3) so as to exclude entry on premises or parts of premises open to the public. Therefore, contrary to former law, the person who enters a business open to the public for the purpose of shoplifting does not commit a burglary.

Section 5-39-201 further requires entry

of "an occupiable structure of another person." "Occupiable structure" is defined in § 5-39-101(1) to include public buildings and places of business as well as private dwelling places. The definition is broad enough to include any "structure" which is used for the purposes of business, public assembly or domicile. Vehicles and boats are included only if persons live (whether permanently or temporarily), carry on a business, or assemble for business purposes, etc., therein. Liability turns not on actual presence of a person in the structure but on whether the structure is used under circumstances such that a person is likely to be present. The final sentence of § 5-39-101(1) makes it clear that the person who makes an unlawful entry from his own apartment or store into an adjoining structure does not have a technical defense based on the fact that both units are part of the same occupiable structure. By making each individual apartment or store a separate unit, the section also permits multiple convictions for the entry of several apartments in the same building or several stores in the same shopping center.

Section 5-39-201 also requires that entry be made with "the purpose of committing therein any offense punishable by imprisonment." This language changes prior law, which permitted a burglary conviction for entry with intent to commit a felony or any larceny, including petit larceny. The Commission found it difficult to rationalize grounding burglary liability on a purpose to commit petit theft but not, for example, to commit a misdemeanor assault. Accordingly, entry with purpose to commit misdemeanors other than theft suffices to create liability.

1988 Supplementary Commentary to § 5-39-201

Evidence Necessary To Prove Intent

To prove burglary the prosecution must show that the defendant entered an occupiable structure with "the purpose of committing therein any offense punishable by imprisonment." In *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978), which involved the right of a defendant charged with burglary to an instruction on the lesser included offense of breaking and entering, the court stated: "[T]he funda-

mental theory, in the absence of evidence of other intent or explanation for breaking and entering an occupiable structure at night, is that the usual object or purpose of burglarizing an occupiable structure at night is theft." *Id.* at 564, 572 S.W.2d at 849. This language suggests that the unexplained entry by the defendant of an occupiable structure at night is sufficient evidence of the intention to commit a felony. In *Washington v. State*, 268 Ark.

1117, 599 S.W.2d 408 (Ct. App. 1980), however, the Court of Appeals reversed a burglary conviction when there was no evidence from which to infer the purpose to commit a crime other than the entry of an apartment by the defendant. A few months later, in *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980), the Supreme Court held that the specific intent to commit a crime could not be presumed from a mere showing of illegal entry of an occupiable structure. According to the Court, the United States Supreme Court decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson v. New York*, 432 U.S. 197 (1977), require the prosecution to prove each and every element of the offense beyond a reasonable doubt and preclude shifting to the defendant the burden of explaining his illegal entry.

The holding of *Norton* was subsequently applied in *Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982), where the defendant was discovered by the occupant of a residence and fled when the occupant began screaming. But *Norton* was distinguished in *Johnson v. State*, 7 Ark. App. 172, 646 S.W.2d 22 (1983), in which the evidence established not only that the defendant illegally entered a house but that the owner's purse was discovered missing soon after the defendant fled. In *Hickerson v. State*, 282 Ark. 217, — S.W.2d — (1984), evidence that the defendant entered an unlocked house, apparently uninvited, and talked with victim for several minutes before committing rape was held insufficient to support a finding that he intended to commit a felony at the time he entered the house.

In *Holmes v. State*, 288 Ark. 72, 702 S.W.2d 18 (1986), the Court reviewed appellant's convictions for eight felonies, one of which was burglary. The victims, a man and his wife, had fallen asleep watching television. When they awoke, appellant was standing in front of them. A fight ensued in which a victim received injuries giving rise to second degree battery liability. Appellant argued that the evidence did not support the burglary conviction. The Court disposed of this contention as follows:

Appellant does not dispute that the evidence was sufficient on the first element, entry. Instead, he argues that the State did not prove the sec-

ond element, intent to commit an offense punishable by imprisonment. The short answer to the argument is that the State did prove that ... appellant did, in fact, intentionally commit ... second degree battery.

288 Ark. at 74, 702 S.W.2d at 19.

The Court did not find that appellant intended to commit an offense prior to entering the victim's home, however, something that is unquestionably required and which might conceivably have been subject of doubt in view of appellant's bizarre behavior during the two days in question. Compare, *Henry v. State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986). See, also, *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980) where the Arkansas Supreme Court held that it is impermissible to infer an intent to commit an offense punishable by imprisonment from mere evidence of illegal entry. The *Norton* Court declined to overrule cases such as *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978), where the accused fled from police officers. The opinion in *Norton* pointed out that "We have consistently suggested that the flight of an accused to avoid arrest is evidence of his felonious intent." 271 Ark. at 454, 609 S.W.2d at 3. Whether flight should be deemed evidence of felonious intent arising prior to the initial illegal entry is another matter, one on which the Court has not spoken definitively.

For recent cases on intent and illegal entry, see *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985); *Jimenez v. State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984); *Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984). However, proof of purpose to commit an offense is frequently inferred from circumstantial evidence. See *Oliver v. State*, for instance.

Entry Requirement

The original commentary to § 5-39-201 makes it clear that the drafters consciously narrowed the scope of the offense of burglary in recognition of the fact that the comprehensive attempt statute found in Chapter 3 had substantially undercut the common law rationale for an expansive definition of the offense. *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978) illustrates this narrowed scope. In that case the defendant was accused of having broken a window in a drive-in restaurant with intent to commit a theft. Such con-

duct would have constituted burglary under the pre-code definition of the offense found at § 41-1001 (Repl. 1964), which allowed a conviction upon proof that the accused had either "broke" or "entered" a structure. The Code definition of burglary requires "entry" into a structure, and the Court held in *Seiph* that while the accused was guilty of violating § 5-39-202, which retains "breaking" or "entering" as alternative elements, he was not guilty of burglary.

The right of a defendant charged with burglary to an instruction on the lesser included offenses of breaking and entering, or criminal trespass is discussed in the supplementary commentary to § 5-1-110.

See AMCI 2002.

Multiple Convictions Based on Same Conduct

In *Avery v. State*, 15 Ark. App. 134, 690 S.W.2d 732 (1985) the Court of Appeals upheld the defendant's convictions of burglary and attempted rape.

The evidence showed that the defendant entered the victim's home uninvited and solicited sex without physically abusing her or attempting to do so. The victim became agitated, ran from her home, and contacted the police, who arrested defendant shortly thereafter. The court found that the unlawful entry followed by the defendant's entreaties constituted "a substantial step in a course of conduct intended to culminate in the commission of an offense." § 5-3-201(a)(2).

The four judge majority opinion did not touch on whether convictions of both attempted rape and burglary could stand under § 5-1-110, since this issue was not raised at trial or briefed on appeal. A concurring opinion argued, however, that had the question been faced both convictions should stand because "it is not necessary to prove an unlawful entry into an occupiable structure to establish rape or

attempted rape." *Id.* at 140, 690 S.W.2d at 736.

Two judges dissented from the affirmation of both convictions, stating that, since the court found that defendant's entry into the house and the solicitation of the victim constituted the substantial step on which defendant's conviction of attempted rape was based, the convictions were *in fact* based upon the same conduct. In other words, the concurring opinion interprets § 5-1-110 to require that the Court compare statutory definitions in determining whether one offense "is established by proof of the same or less than all the elements required to establish the commission of [another offense]." § 5-1-110(b)(1). The dissent, on the other hand, seems to argue that the determination should turn on whether the same conduct is *actually* the basis for each conviction. No Arkansas case has been found in which these alternative readings of § 5-1-110 have been explicitly drawn in issue. Since the majority in *Avery* did not reach this issue, the question has not yet been decided. It should be noted, however, that in *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983) in a discussion of whether convictions for battery in the first degree under § 5-13-201(a)(4) and aggravated robbery could stand, the Court said:

The information charged battery in the first degree by use of the pistol which was used to commit the aggravated robbery. Therefore, *the facts of the present case required proof of the aggravated robbery, the underlying felony, in the course of proving battery in the first degree which was alleged to have been committed during the course of a felony.* Under the informations here in question the greater offense *was actually included* in the lesser offense.

Id. at 183, 644 S.W.2d 275.

Original Commentary to § 5-39-202

Section 5-39-202, defining the offense of "breaking or entering," serves two functions.

First, insofar as it proscribes breaking and entering a building, structure, or vehicle with the intent to commit a theft or felony, the section states a lesser included

offense of burglary and restores some of the broad coverage of the earlier burglary statute. See, former law previously codified as Ark. Stat. Ann. § 41-1001 (Repl. 1964). However, it is punished much less severely than burglary in recognition of the fact that this offense is designed pri-

marily to protect property rather than people. All burglaries as defined by § 5-39-201 will by definition constitute breaking or entering. Consequently, the availability of the lesser offense may prove to be a useful plea bargaining tool in some cases.

The second function of § 5-39-202 is to reach larcenous conduct directed against vending machines and other types of con-

tainers likely to contain money. *Cf.* prior law formerly codified as Ark. Stat. Ann. § 41-3944 (Supp. 1973). In most cases, the perpetrator of such acts intends to take anything of value he finds within the container. Consequently, the offense is defined so as to dispense with any need to show the value of the property within the container.

1988 Supplementary Commentary to § 5-39-202

State v. Scarmardo, 263 Ark. 396, 565 S.W.2d 414 (1978) rejected the prosecution's argument that the "other similar containers, apparatus, or equipment" protected by this section included electric meters. The result is clearly correct, particularly in view of § 5-36-104, which is more specifically addressed to the theft of electricity and other types of utility service.

Lesser Included Offenses: Burglary and Breaking or Entering

In those cases in which the accused breaks or enters into a building or structure, breaking or entering will be a lesser included offense of burglary, as defined in § 5-39-201. *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982); *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978); *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978); *Barksdale v. State*, 262 Ark. 271, 555 S.W.2d 948 (1977). The right of a defendant charged with burglary to an instruction on the lesser included offense

of breaking and entering is discussed in the supplementary commentary to § 5-1-110.

Lesser Included Offenses: Breaking or Entering and Tampering

The Court of Appeals has held that tampering with physical evidence is a lesser included offense of breaking or entering. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985). Blair broke into a sheriff's vehicle to remove evidence that he had committed an offense. On the one hand, breaking or entering requires proof of breaking or entering a vehicle for the purpose of committing a theft or a felony. On the other hand, tampering with evidence requires proof of destroying something to make it unavailable in an official proceeding. It is difficult to see how it could be said under § 5-1-110 that either offense is included in the other, although Blair's conduct constituted both offenses.

See AMCI 2003.

Original Commentary to § 5-39-203

An offense is committed under this section when the actor without license or privilege enters the premises or vehicle of another. Entry completes the crime; no purpose to engage in further unlawful conduct is necessary. The section applies to a wide range of circumstances. An example of conduct constituting an offense is a transient entering premises or a vehicle in order to have a comfortable place to drink, sleep, or otherwise engage in activities not in themselves criminal. The section can also be used to prosecute an unruly patron who refuses to leave a place

of business after the owner justifiably withdraws a license to remain. Since "premises" includes any real property, the section also complements existing statutes proscribing trespass to land. See, *e.g.*, authority previously codified as Ark. Stat. Ann. § 41-4212 (Repl. 1964); § 41-4212.1 et seq. (Supp. 1973); § 47-532 et seq. "Enters and remains unlawfully" is defined so as to retain the concept embodied in present law that unimproved, unfenced land is deemed open to the public unless notice not to enter is communicated by personal warning or conspicuous posting.

1988 Supplementary Commentary to § 5-39-203

Lesser Included Offenses: Burglary and Criminal Trespass

Criminal trespass, as defined in this section, will always be a lesser included offense of burglary, as defined in § 5-30-201 since the person who enters or remains unlawfully in an occupiable structure of another by definition enters or remains unlawfully upon the premises of another. See *Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982); *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978). Criminal trespass is also a lesser included offense of breaking and entering, as defined in § 5-39-202, at least when the latter is committed by entering or breaking into a "building, structure, [or] vehicle." The characterization as a lesser included offense is most significant when the defendant charged with burglary or breaking and entering requests an instruction on the lesser included offense of criminal trespass. For a discussion of the defendant's right to such an instruction, see the supplementary commentary to § 5-1-110.

Holdover Tenants Not Criminal Trespassers

The Arkansas Supreme Court has ruled that § 5-39-203 does not apply to tenants who holdover illegally after notice to vacate given under § 18-16-101. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985). The Court was unable to find any appellate case holding that a tenant can commit a criminal trespass. It further indicated that traditionally the criminal trespass statute has been construed to require proof of an illegal entry. It further found legislative intent that another statute provides an exclusive remedy in landlord-tenant cases.

Justices Dudley and Newbern dissented in an opinion by Justice Dudley opining that the statute on its face clearly applies to holdover tenants and that the criminal trespass statute and the unlawful detainer statute found at § 18-60-304 are not inconsistent provisions but merely embody alternative remedies.

See AMCI 2004.

Original Commentary to § 5-52-101

Chapter 52 deals with criminal conduct involving "public servants," as defined by § 5-1-102(16), and affecting public offices generally.

Section 5-52-101, prohibiting trading in public office, is drawn from Proposed Michigan Code § 4725 and M.P.C. § 240.7. Pre-existing Arkansas statutory authority is found at Ark. Stat. Ann. § 3-1104 (Supp. 1973) and is slightly more restrictive in scope: the only benefit prohibited appears to be campaign support or assistance by the person approached. It is also unclear whether the statute reaches cases where something is received by a political organization rather than by a politician. With the adoption of § 5-52-102, Arkansas joins the minority of jurisdictions making it criminal to take money to procure appointment of another as a public servant or to designate another as a candidate for public office. See, M.P.C. § 240.7, *Comment at 116, 117 (Tent. Draft No. 8, 1958)*.

The draft contains broader language than the proposed Michigan provision, which requires that one party to the transaction be a public servant or party officer. The provision's coverage is also more comprehensive than that of M.P.C. § 240.7, since the scope of § 41-2701 is not limited in terms of "pecuniary" benefits. As for the quid pro quo for the benefit conferred, § 5-52-101 is more narrowly drawn than its Model Penal Code counterpart, which speaks in terms of a benefit given for "approval or disapproval of an appointment or advancement in public service, or for approval or disapproval of any person or transaction for any benefit conferred by an official or agency of government." As is true of several other provisions contained in this article, the section's prohibition condemns the offering or conferring of benefits, the receipt of which is prohibited.

Original Commentary to § 5-52-102

Section 5-52-102 had no counterpart in earlier statutory law. The provision prohibits solicitation or acceptance of benefits by a public servant *subsequent* to his decision, vote, exercise of discretion, etc. The language of the section is drawn from M.P.C. § 240.3 which describes the provision's rationale as follows:

"Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery

for the future, when some "clients" of a public servant undertake to pay him for favors, others who deal with the same public servant are put under pressure to make similar contributions or risk subtle disfavor." M.P.C. § 240.3, *Comment at 109* (Tent. Draft No. 8, 1958).

It will be observed that it is no defense to a prosecution under this section that the action taken by the public servant was otherwise proper. Foreclosing this line of defense is justified by the rationale supporting creation of the offense itself.

Original Commentary to § 5-52-103

Section 5-52-103 expands the scope of old authority formerly found in a long, almost incomprehensible statute at Ark. Stat. Ann. § 41-901 (Repl. 1964). Like this earlier authority, the Code provision prohibits conferring benefits upon a member

of the General Assembly to improperly influence him. Because § 5-52-103 speaks in terms of all "public servants" and not merely legislators, it has much broader application than former § 41-901. See, § 5-1-102(16).

1988 Supplementary Commentary to § 5-52-103

See AMCI 2703.

Original Commentary to § 5-52-104

Section 5-52-104 punishes extortive conduct by public servants. Since it comprehends conduct by a public servant required to perform services without compensation other than salary, it provides more extensive coverage than pre-existing law. See, Ark. Stat. Ann. § 12-1738 (Repl.

1968), addressing an "officer" charging or demanding "greater fees for his services than are allowed by law." Cf., *Sebastian Bridge District v. Lynch*, 200 Ark. 134, 138 S.W.2d 81 (1940). Additionally, the section's prohibition runs to acceptance of benefits other than monetary ones.

Original Commentary to § 5-52-105

Section 5-52-105 is a counterpart of §§ 5-53-109 and -114. It prohibits threatening or deceitful conduct calculated to cause a public servant to grant special favors, etc. Apparently, no corresponding statutory authority existed previously. Cf.

prior law formerly found at Ark. Stat. Ann. § 41-2804 (Repl. 1964) (threats to witnesses); § 41-4001 (Repl. 1964) (threatening anyone to prevent the doing of a lawful act).

Original Commentary to § 5-52-106

Prior to enactment of the Code, Arkansas law did not contain an equivalent provision of general application. Section 5-52-106 is patterned after Proposed Missouri Code § 21.050; Proposed Massachu-

setts Code C. 268-A, § 26; and M.P.C. § 243.2. In essence, the section prohibits "speculation . . . on official action the public servant is in a position to influence, or on the basis of confidential information

to which he has access only for official purposes." *M.P.C. § 243.2, Comment at 119 (Tent. Draft No. 8, 1958)*. It should also be noted that "speculate" as used in subsection (a)(2) includes either buying property in anticipation of a profit or selling property to prevent a loss. Thus, it

reaches the public servant who learns that property he acquired prior to entering public service will depreciate in value and sells before the general public is aware that the value of the property has fallen.

Original Commentary to § 5-52-107

Like § 5-52-106, this provision breaks new ground. It follows New Hampshire Criminal Code § 643.1 (1971); New York Penal Law § 195.00; and Proposed Mas-

sachusetts Code C. 268A, § 25. The section punishes the public servant capitalizing on his office through an act or omission known by him to be unauthorized.

Original Commentary to § 5-53-101

Chapter 53, dealing with conduct such as perjury and bribery of witnesses and jurors, defines offenses striking at the very heart of the administration of criminal justice.

"Juror" is defined by § 5-53-101(a) to include not only persons actually serving on any kind of jury but also persons "drawn" from the wheel pursuant to Ark. Code Ann. § 16-32-105 or actually "summoned" as prospective jurors thereunder.

"False material statement" is defined by subsection (a)(2) in a way excluding considerations of admissibility and actual impact on the official proceedings involved. "Materiality" as here defined is consistent with the formulation previously in force in Arkansas. See, e.g., *Robertson v. State*, 54 Ark. 604, 16 S.W. 582 (1891); *Harris v. State*, 119 Ark. 408, 177 S.W. 1144 (1915).

Subsection (a)(3), defining "oath," is taken from Proposed Michigan Code § 4901(3). It proceeds on the assumption that any procedure for administering an oath is sufficient so long as the declarant is alerted to the fact that the state has a special interest in the truthfulness of his statements. Since criminal sanctions should accrue only when the general assembly has decided that such a special interest exists, the oath must be "authorized by law." Consequently, an agency or public official cannot, without legislative authorization, require an oath and thereby make falsifications punishable as a criminal offense. Subsection (a)(3) also describes several circumstances in which written statements will be treated as made under oath. Subsection (a)(3)(A) is designed to facilitate the verification of

reports made to state agencies and officials. Subsection (a)(3)(B) recognizes the loose procedures followed by many public officials and notaries in administering the oath to affidavits and other legal documents. It prevents the declarant from accepting the benefits to which an affidavit or other affirmation under oath is a prerequisite, and then escaping liability for falsifications by attacking technical defects in the administration of the oath. The final subsection incorporates the wide variety of other procedures previously authorized by law for attesting to the veracity of a statement. Subsection (a)(3) comports with prior law. See, Ark. Stat. Ann. §§ 27-125, 27-126 (Repl. 1962); 40-101, et seq. (Repl. 1962); and *Hudson v. State*, 207 Ark. 18, 179 S.W.2d 165 (1944).

"Official proceeding" is defined by subsection (4). Apparently, this was formerly not a statutorily defined term of art in Arkansas. It plays an important role in subsequent sections by delineating the contexts in which perjury may be committed.

"Testimony" is defined broadly by subsection (5) to include any evidence that is or could be offered at an official proceeding.

"Threat" is defined so as to embrace not only menaces of physical force, but also other less direct but equally insidious means of influencing the actions of a witness or a juror.

Lastly, "witness" is given an expansive definition formulated alternatively in terms of issuance of legal process and intent of the "potential" witness to testify, not in terms of the person's knowledge

respecting the subject matter of an official proceeding. This definition is somewhat more comprehensive than that provided

by former authority. See, *Poe v. State*, 95 Ark. 172, 177, 129 S.W. 292, 295 (1910).

1988 Supplementary Commentary to § 5-53-101

In *Slavens v. State*, 1 Ark. App. 245, 614 S.W.2d 529 (1981) the admissibility of a prior inconsistent statement made by a witness at a criminal trial turned on whether the prior statement, which had been given under oath to a deputy prosecuting attorney pursuant to Ark. Stat. Ann. § 43-801 [§ 16-43-212], was made in an "other proceeding," as used in Rule 801(d) (1) (i) of the Uniform Rules of Evidence (codified as Ark. Code Ann. § 16-14-101). By resorting to the definition of "official proceeding" that appears in § 5-53-101, the Court of Appeals concluded that a statement under oath to the prosecuting attorney was made in an "official proceeding" and hence an "other proceeding" within the meaning of Rule 801. Implicit in the Court's ruling is the determination that making a false statement under oath to a prosecuting attorney or

his deputy constitutes the offense of perjury (§ 5-53-102) and not false swearing (§ 5-53-103). Since § 16-43-212 authorizes prosecuting attorneys and their deputies to administer oaths for the purpose of taking the testimony of witnesses "subpoenaed before them," it could be argued that a person who appears voluntarily before a prosecutor and makes a false statement under oath cannot be convicted of perjury. The contrary argument is that under § 5-53-105 such an irregularity would be no defense. In any event, if the person making the statement to the prosecutor did so with a purpose of hindering the prosecution of another, he would be guilty of violating § 5-54-105 whether or not he was under oath at the time he made the statement.

See AMCI 2601-2603.

Original Commentary to § 5-53-102

Section 5-53-102 defines perjury, an offense considered by the Commission to be one of singular gravity, for, as is pointed out by the Model Penal Code:

"False testimony ... can convert governmental power into an instrument of injustice rather than justice, with unfortunate consequences not only for the individual whose life, freedom or property may be affected, but also for the sake of the community's general sense of security and confidence in the state." *M.P.C. § 241.1, Comment at 100 (Tent. Draft No. 6, 1957)*.

Former statutory authority on perjury and related offenses was prolix, overlapping, and ambiguous. See, prior law formerly found at Ark. Stat. Ann. § 41-3001 (Repl. 1964) (perjury in the first degree); § 41-3002 (Repl. 1964) (perjury in the second degree); § 41-3011 (Repl. 1964) (false swearing). Perjury in the second degree, in particular, was a redundant offense. It appears to have been primarily directed at the person who falsely testified as to an immaterial matter. The need for such an offense is doubtful. The rationale for punishing perjury is preventing sub-

version of judicial and other governmental processes. This rationale evaporates when, by definition, the declarant's statements have no effect on the particular governmental process. The low priority attached to false immaterial statements under oath was reflected by the penalty provision of perjury in the second degree which prescribed a fine only of no more than \$500 — a sanction with minimal deterrent effect. See, former Ark. Stat. Ann. § 41-3006 (Repl. 1964).

For these reasons, the Code criminalizes only false material statements, such statements being punished either as perjury (§ 5-53-102) or false swearing (§ 5-53-103). The distinguishing feature between the two offenses is whether or not the false statement is made at an "official proceeding" as defined in § 5-53-101(4). False statements at an official proceeding are treated more seriously because (1) matters of considerable importance are generally at issue; and (2) the significance of his statements is impressed on the declarant through the solemnity of a formal oath. The necessity

that the oath be "required or authorized by law" reiterates the point made in the Commentary at § 5-53-101 that criminal sanctions should be imposed for false statements only when the general assembly has specifically determined the need for truthful information.

It is no defense to charge under § 5-53-102 that the declarant was unaware of the materiality of his statement. Prior law appears to have been silent as to this proof requirement. As indicated by § 5-53-101(2), whether a particular statement is material is a question of law. This is in accord with previous Arkansas law. *Barre*

v. State, 99 Ark. 629, 139 S.W. 641 (1911).

It should be noted that a number of current statutes provide that false statements to a particular board or agency are punishable as perjury. Lack of time prevented a thorough examination of this proliferation of authority to determine, consistent with the principles set out above, which false statements should be treated as perjury and which as false swearing. It is hoped that the general assembly will in future sessions revise these statutes to conform to Code requirements.

1988 Supplementary Commentary to § 5-53-102

See AMCI 2602.

Original Commentary to § 5-53-103

Section 5-53-103, false swearing, had a counterpart of the same name under old law. See, prior law formerly found at Ark. Stat. Ann. §§ 41-3011, 3012 (Repl. 1964). Prior authority was framed broadly indeed, overlapping in coverage with first and second degree perjury to the extent that a person committing either degree of perjury probably committed false swearing in addition.

Under the Code, false swearing is committed by knowingly making a false material statement under oath other than in an official proceeding. It is not a lesser included offense of perjury; in fact, the two offenses are defined so as to be mutually exclusive. As is the case with perjury, lack of knowledge of the materiality of the false statement is no defense.

1988 Supplementary Commentary to § 5-53-103

See AMCI 2603.

Original Commentary to § 5-53-104

Section 5-53-104 provides Arkansas law with an entirely new, albeit carefully restricted, defense to perjury: retraction. In permitting the assertion of this defense the Code attempts to encourage recantation of false testimony. Under some formulations, the defense is denied if retraction causes termination of the proceedings. See, M.P.C. § 241.1(4). This restriction on the defense has been rejected in recent revision efforts on the grounds that the motivation to set the record straight should exist so long as evidence is still being heard in the case. See, Proposed Oregon Code § 187; Proposed Michigan Code § 4930. Subsection (3) adopts a middle ground, permitting retraction at any

time prior to submission of the case to the factfinder, but imposing misdemeanor liability if retraction leads to termination of the proceeding.

Retraction has long been a common law defense in New York and other states. It has, on the other hand, been rejected by other jurisdictions. See, Annot., 64 A.L.R. 2d 276 (1959); M.P.C. § 241.1, *Comment at 128-131* (Tent. Draft No. 6, 1957); and Proposed Massachusetts Code C. 268, § 1, *Commentary at 146*. Federal authority is found at 18 U.S.C.A. § 1623(d) (Supp. 1975). For recent developments at the federal level, see *United States v. Lardieri*, 497 F.2d 317 (3rd Cir. 1974). In adopting § 5-53-104, Arkansas has also followed

the lead of the proposed codes of Oregon (§ 187), Texas (§ 37.05), Michigan (§ 4930), and Missouri (§ 20.040). Arkan-

sas alone, however, imposes misdemeanor liability when retraction causes termination of the affected proceedings.

1988 Supplementary Commentary to § 5-53-104

See AMCI 2602-D.

Original Commentary to § 5-53-105

Commonly encountered irregularities may not be asserted as defenses to prosecutions for perjury or false swearing. As is true of the analogous Model Penal Code provision:

"The guiding principle is that when the community commands or authorizes certain statements to be made with special formality or on notice of special sanction, the seriousness of the demand for honesty is sufficiently evident to warrant applica-

tion of criminal sanctions." *M.P.C. § 241.1, Comment at 127 (Tent. Draft No. 6, 1957)*.

Section 5-53-105 conforms to prior law. See, *Hudson v. State*, 207 Ark. 18, 179 S.W.2d 165 (1944), and *Cox v. State*, 164 Ark. 126, 261 S.W. 303 (1924); *Cf.*, former authority previously located at Ark. Stat. Ann. § 41-3002 (Repl. 1964) (last sentence).

Original Commentary to § 5-53-106

Section 5-53-106 permits a perjury or false swearing conviction based solely on contradictory statements under oath. *Cf.*, prior law formerly found at Ark. Stat. Ann. § 41-3008 (Repl. 1964) permitting multiple statements to be charged in different counts of one indictment, but requiring proof of the falsity of at least one statement. Under the Code, if the inconsistent statements were both made at an official proceeding, the witness can be convicted of perjury. If the inconsistent statements were both made under oath in circumstances other than an official pro-

ceeding, the witness can be convicted of false swearing. However, if one statement was made at an official proceeding and an inconsistent statement was made under oath other than in an official proceeding, the section gives the witness the benefit of the doubt and assumes that the latter statement was the false one, subjecting him to conviction of false swearing at most. Of course, if there is independent evidence sufficient to prove that the statement at the official proceeding was false, the witness can still be convicted of perjury.

Original Commentary to § 5-53-107

Section 5-53-107 is descended from the common law "two witness rule." It provides that, except in prosecutions under § 5-53-107, falsity may not be established solely through contradiction by the uncor-

roborated testimony of a single witness. This is in accord with prior Arkansas law. *Stubblefield v. State*, 201 Ark. 611, 146 S.W.2d 688 (1941).

Original Commentary to § 5-53-108

Former law on witness bribery was found at Ark. Stat. Ann. § 41-2804 (Repl. 1964), which proscribed "bribing" or attempting to bribe a "witness" to absent himself, avoid process, or withhold evidence. Neither "bribery" nor "witness" was defined.

Section 5-53-108 prohibits offering, agreeing to offer, or actually conferring a benefit upon a witness or one who the actor believes may be called as a witness, if the actor's purpose is to accomplish the enumerated ends. Like most new codes, the section recognizes the range of bene-

fits having other than economic significance. The provision's scope is consequently not restricted by reference to *pecuniary* benefit. Accord. Proposed Massachusetts Code C. 268, § 5; Proposed Texas Code § 36.05; Proposed Missouri Code § 20.270; and Proposed Hawaii Code § 1073. Compare, Proposed Oregon Code §§ 179, 180; and Proposed Michigan Code § 5005. Given the expansive definition of "witness" and "testimony," the section has broad application.

To the extent the section reaches a mere

offer, it establishes an inchoate offense. This reflects the Commission's view that the conduct described is so deleterious to the administration of justice that attempts are justifiably graded with the same severity as the consummated offense.

It should also be noted that the provision's prohibition extends to the corrupt witness. Unlike former law, it subjects to prosecution for bribery the witness who solicits, accepts, or agrees to accept a benefit.

1988 Supplementary Commentary to § 5-53-108

See AMCI 2608.

Original Commentary to § 5-53-109

This provision complements Section 5-53-109. Where the former strikes at subversion of the judicial process by bribery, § 5-53-109 reaches "threatening" conduct defined by § 41-2601(6). The section speaks in "inchoate" terms to the same extent and for the same reasons as does

§ 5-53-108. The sweeping definition assigned the term "threat" encompasses the veiled as well as the bluntly offered menace. Previous authority was consistent in theory and language. See prior law formerly codified as Ark. Stat. Ann. § 41-2804 (Repl. 1964).

1988 Supplementary Commentary to § 5-53-109

See AMCI 2609.

Original Commentary to § 5-53-110

Like the two preceding sections, § 5-53-110 defines a crime involving persuasion of another person to impede the judicial process. The provision is patterned after Proposed Michigan Code § 5020 and Proposed Federal Code § 1322. Although proof of a threat or bribe will establish the crime, the section is drawn so as to include within its sweep conduct other than threats or offers of pecuniary benefit. For example, one who seeks to trade on friend-

ship with a potential witness to have information withheld would fall within the provision's purview. Since such behavior is less reprehensible than bribery or intimidation, the offense receives misdemeanor grading. The scope of the section extends beyond that of the only analogous former statutory provision, Ark. Stat. Ann. § 41-2804 (Repl. 1964), which required proof of the use of "unlawful means."

1988 Supplementary Commentary to § 5-53-110

See AMCI 2610.

Original Commentary to § 5-53-111

Section 5-53-111 had its origin in Proposed Federal Code § 1323. It extends the concept of “tampering” to physical evidence. The section’s coverage is somewhat akin to that of prior authority previously found at Ark. Stat. Ann. §§ 41-2815, 2816 (Repl. 1964), which prohibited theft, destruction, etc., of public or private records with intent to “defraud” (§ 41-2815) or “injure” (§ 41-2816). However, since § 5-53-111 is specifically designed to thwart obstructions of justice, not to prevent “frauds” or “injuries” generally, it has a

narrower focus. That is, only tampering intended to impede official proceedings or investigations is reached. The more precise Code counterpart to prior §§ 41-2815, 2816 is tampering with a public record (§ 5-54-121).

Although the guilty defendant will most commonly have the strongest motivation to tamper, the section provides for extraordinary circumstances through the “prosecution or defense” terminology of subsection (b).

1988 Supplementary Commentary to § 5-53-111

Tampering with physical evidence so as to impair or obstruct the prosecution or defense of a felony is a Class D felony. Other instances of tampering with physical evidence are punishable as a Class B misdemeanor. In *Scott v. State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981), the Court held that the burden was on the state to show that the prosecution of a felony was actually impaired or obstructed. In that case, the defendant threw away a gun that had been used in a shooting. Since the evidence did not show that the shooting constituted a felony, the Court reduced a Class D felony tampering conviction to a Class B misdemeanor conviction. It is not clear how much evidence the state must introduce in a tampering case in order to discharge its burden of showing that the tampering hindered the prosecution of a felony. If tampering with the evidence makes it impossible to prosecute

for the underlying felony, it may likewise be difficult to prosecute for felony tampering with physical evidence.

Lesser Included Offenses: Breaking or Entering and Tampering

The Court of Appeals has held that tampering with physical evidence is a lesser included offense of breaking or entering. *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985). Blair broke into a sheriff’s vehicle to remove evidence that he had committed an offense. Breaking or entering requires proof of breaking or entering a vehicle for the purpose of committing a theft or a felony. Tampering with evidence requires proof of destroying something to make it unavailable in an official proceeding. It is difficult to see how it could be said under § 5-1-110 that either offense is included in the other, although Blair’s conduct constituted both offenses.

Original Commentary to § 5-53-112

This section is based on Proposed Federal Code § 1367. It had a somewhat more limited counterpart in former Ark. Stat. Ann. § 41-2818 (Repl. 1964) (assault, reprisals, or pressure on juror for action taken as juror). If retaliation takes the form of criminal conduct, a charge under § 5-53-112 may accompany a charge

grounded on the retaliatory conduct itself. However, it was not the Commission’s intent to restrict the meaning of “unlawful” conduct to include only “criminal” conduct. As is the case under the Proposed Federal Code, “unlawful” conduct also embraces torts such as actionable interference with an employment contract.

1988 Supplementary Commentary to § 5-53-113

See AMCI 2613.

1988 Supplementary Commentary to § 5-53-114

See AMCI 2614.

Original Commentary to § 5-53-115

Sections 5-53-113 to -115 substantially restate old law formerly found at Ark. Stat. Ann. §§ 41-2805 to -2807 (Repl. 1964). In doing so, the Code provisions closely parallel the preceding provisions applicable to corrupt influence of witnesses.

Section 5-53-113(a)(1) prohibits offering or conferring a benefit upon a juror to influence the judicial process. Bribe receipt or solicitation by jurors with the same real or professed end in view are covered by subsection (a)(2). Presently, felony liability is imposed for the former type of conduct by former § 41-2806 and for the latter by prior §§ 41-2805, -2807.

Subsection 5-53-113(a)(1) tracks former law by imposing liability for giving or offering *any* benefit. *Cf.*, previous § 41-

2806 (“ . . . giving or offering to give any gratuity or gift whatever, or *by any means whatsoever*. . .” [emphasis added]). By proscribing solicitations by jurors, § 5-53-113(a)(2) extends the reach of old authority. See, earlier §§ 41-2805, -2807.

An analogue to § 5-53-109 (intimidating a witness) is found in § 5-53-114, which prohibits threatening a juror. This apparently is in accord with earlier Arkansas law. See prior law formerly codified as Ark. Stat. Ann. § 41-2806.

Section 5-53-115 is designed to pick up behavior not constituting a bribe or threat. It applies to all communications outside the confines of the particular proceeding intended to influence a juror’s deliberations.

1988 Supplementary Commentary to § 5-53-115

See AMCI 2615.

Original Commentary to § 5-53-116

The Commission was of the same mind as the Reporters of the Proposed Oregon Code in viewing simulation of legal process as an interference with judicial process:

“The false simulation of an official legal document subverts the legitimacy of judicial administration by impairing public confidence in the genuine article.” Proposed Oregon Code § 210, *Commentary at 207*.

The section is designed to discourage activities such as use of misleading documents in debt collection. Like former law, the provision requires purpose to obtain something of value through use of a document known to resemble legal process. See, prior law formerly codified as Ark. Stat. Ann. §§ 41-1978 et seq. (Supp. 1973).

Original Commentary to § 5-54-101

A “correctional facility” is a place used for confinement of persons. The definition is broad enough to encompass a place used for incarceration of persons charged with or convicted of crimes; detained under court order as, for example, a material

witness; or awaiting extradition or deportation. The definition also extends to the Arkansas state hospital in the designated circumstances.

“Custody” is defined as restraint by a law enforcement officer other than deten-

tion in a correctional facility, training school, or state hospital. As used in the definition, "restraint" connotes a total deprivation of liberty. Lesser restrictions on a person's liberty, such as those sometimes imposed pursuant to suspension, probation, or release on bail, do not constitute "custody." The person who breaches such restrictions may be guilty of failure to appear (§ 5-54-120), but cannot be convicted of escape (§§ 5-54-110 to -112). The restraint must be subsequent to an arrest. The person who flees following an officer's order to halt is not in custody and consequently does not escape from custody. Likewise, the material witness who disobeys an order to remain at the scene of a crime does not escape from custody. The definition of "custody" takes no position on whether the arrest must be lawful. Instead, the various degrees of the offense of escape are defined so that the legality of the arrest is relevant only when the arrestee does not use force to effect his escape. See, §§ 5-54-110 to -112, and Commentary thereto. Finally, by excluding correctional facilities and other institutions, the definition limits when a person is in custody to the time between arrest and incarceration or spent in transit between various correctional facilities, courts, and other institutions.

The definition of "escape" is consistent with former authority and is self-explanatory.

Subsection (4) defines "governmental function" in terms of activities lawfully undertaken by public servants. Formerly, no comprehensive statutory counterpart existed, although the courts were from time to time called on to ascertain whether diverse functions were "governmental" ones. See, *e.g.*, *Kirksey v. City of Fort Smith*, 227 Ark. 630, 300 S.W.2d 257 (1957).

"Implement for escape" and "implement for unauthorized departure" are given parallel, functional definitions distinguished only by the type of facility in which they may be employed. A person can "escape" only from custody or a correctional facility. "Unauthorized departure" is not separately defined. It is used in this chapter to refer to the inmate of a juvenile school or state hospital who leaves without permission.

"Prohibited article" is a related, but

broader term than "implement for escape" or "implement for unauthorized departure." The definition of "prohibited article" speaks in more detail as a result of amendment by Act 360 of 1977 in anticipation of a new grading scheme for the offense of furnishing prohibited articles. See, § 5-54-119. "Controlled substance" is defined to exclude drugs prescribed for an inmate and smuggled to him. Such conduct would still constitute an offense, but one less serious than an offense involving introduction of unprescribed controlled substances into a facility. "Weapon" is broadly defined along lines suggested by § 5-1-102(4).

"Juvenile training school" and "Arkansas State Hospital" are defined in subsections (7) and (12) respectively by reference to existing statutory authority.

"Physical force" and "deadly physical force," defined in subsections (8) and (9), are given the same meaning here as in several other chapters. See, *e.g.*, §§ 5-2-601 and 5-12-101. The terms are used throughout this chapter to distinguish different degrees of or to authorize different punishments for the same basic offense.

"Public record" is defined by subsection (11) in a fashion somewhat more complete than the previous statutory definition of the same term in the old Freedom of Information Act. See, Ark. Stat. Ann. § 12-2803 (Repl. 1968). The context in which the term is used in this chapter requires a more restrictive definition. See, § 5-54-121. The term applies to all records that are required by law to be either "created by or received and retained by" the government. Consequently, it is not essential that the law require a particular record to be filed; it is sufficient that the law requires a government agency to accept and keep a record if proffered. A private memorandum of an act or transaction, even if it could by law be filed, does not become a public record until actually accepted by the government agency since until that time it is not an "official" record within the meaning of the first clause of the definition. In addition, unlike the analogous provision of the Model Penal Code, the definition of "public record" does not include information required by law to be kept by private persons for use or inspection by the government.

1988 Supplementary Commentary to § 5-54-101

See AMCI 2801.

Original Commentary to § 5-54-102

Virtually all of the offenses defined in Article VIII are directed at specific types of interference with the operation of government. Section 5-54-102 deals generally with the problem of such obstructive conduct. It provides a catchall statute designed to reach conduct not specially treated elsewhere, but it also creates a lesser included offense of most other offenses in this Article.

The offense is normally a class C misdemeanor. More severe penalties result if the actor employs physical force.

Subsection (c) details several instances in which application of the statute is clearly unnecessary or inappropriate. Subsection (c)(1) reflects the basic policy

judgment that, absent the use of force or violence, a mere attempt to avoid apprehension by a law enforcement officer does not give rise to an independent offense. Refusal to submit to an arrest is excepted by subsection (c)(2) since such conduct is the subject of § 5-54-103. Subsection (c)(3) provides a more significant exception. A passive refusal to comply with a duty imposed by a statute or court does not constitute a violation of this section, although, of course, it may be punishable under the other statute or as contempt of court. Finally, subsection (c)(4) recognizes that citizens should not be discouraged from attempting to prevent illegal acts by public officials.

Original Commentary to § 5-54-103

There was no "resisting arrest" statute as such in former Arkansas law. Such conduct was punished under statutes that generally prohibited interference with an officer or proscribed various aggressive acts toward an officer. See, prior law formerly found at Ark. Stat. Ann. § 41-2801 (Repl. 1964) (obstructing or resisting officer); § 41-2802 (Supp. 1973) (assaulting officer); § 41-2803 (Repl. 1964) (threatening officer — drawing gun). Code section 5-54-103 is narrowly confined to the arrest situation. Interference with an officer in other circumstances is dealt with by §§ 5-54-102 or 5-54-104. Resistance must take the form of physical opposition to the arrest. *Completely* passive refusal to submit to an officer attempting to effect an arrest does not constitute resistance.

At common law a person could use reasonable non-lethal force in resisting an unlawful arrest. See, e.g., *Bad Elk v. United States*, 177 U.S. 529, 20 S. Ct. 729, 44 L. Ed. 874 (1900). There is also some Arkansas authority indicating that an officer making an illegal arrest loses the

protection of his office and is treated in the same fashion as a private citizen who initiates an assault. See, *Johnson v. State*, 100 Ark. 139, 139 S.W. 1117 (1911). Subsection 41-2803(3) aligns Arkansas with Alaska, California, Delaware, Illinois, and New Jersey in modifying this traditional rule. See, Annot., 44 A.L.R. 3d 1078 (1972). A private citizen cannot use force to resist an arrest by one who he knows is a law enforcement officer performing his duties, regardless whether the officer had authority to make the arrest. The place to litigate the legality of an arrest is in a court, not the streets. The principle embodied in subsection (c) is repeated in § 5-2-612 — justification: use of physical force in resisting arrest prohibited. As discussed in the Commentary to § 5-2-612, neither that section nor this one applies when the illegality of the arrest stems from use of excessive force by the officer. An arrested person is not compelled to submit peacefully to an illegal beating at the hands of a police officer.

1988 Supplementary Commentary to § 5-54-103

Amendments.

Act 261 of 1987 engrafted the offense of refusal to submit to arrest (§ 5-54-103(b)(1)-(4)) onto the resisting arrest statute. Subsection (b) is perhaps aimed at the person who declines to submit to arrest by failing to follow instructions given by the arresting officer. It will cover cases where the arrestee must be carried to a police car or removed from a sidewalk in front of a building, for instance.

Persons violating subsection (b) will likely be charged with two misdemeanor offenses: the offense for which the arrest was originally made and the refusal offense. A defense to the first offense will not normally excuse the second. Even where the prosecution fails to convict for the first

offense — *e.g.*, a trespass — a sixty day jail term may still be imposed on the defendant who refused to submit on the “rough justice” theory that he was committing no offense. The potential for misuse of this authority is readily apparent, but whether this will prove a problem remains to be seen.

It should also be pointed out that the section does not specify what kinds of acts constitute “refusal to submit” to arrest. It is not clear that one whom a police officer places under arrest for trespass, for example, may not escape liability by announcing that he is submitting to arrest while refusing to move at the direction of the officer.

Original Commentary to § 5-54-104

Section 5-54-104, which is directed at assaults on law enforcement officers, is much broader than § 5-54-103. It is not limited to the arrest context but covers all assaults on officers acting within the scope of their office — *e.g.*, those engaged in executing search warrants, seizing property, or serving civil process. This section is essentially prior law formerly codified as Ark. Stat. Ann. § 41-2802 (Supp. 1973), restated in a form that is easier to understand and that comports with Code terminology. The criteria set

out in subsection (b)(1) for imposing felony liability are based on former Ark. Stat. Ann. § 41-2802.1 (Supp. 1973).

Subsection (b)(1)(B) was amended by Act 360 of 1977 to impose class C felony liability for interference with a law enforcement officer if the person interfering is assisted by another person *and* the law enforcement officer suffers physical injury. Prior law required that the interferer be assisted by two or more persons before such liability accrued.

1988 Supplementary Commentary to § 5-54-104

To the consternation of the Supreme Court, the correct application of §§ 5-54-103 and -104 remained unclear for years after enactment of the Code.

In *Breakfield v. State*, 263 Ark. 398, 566 S.W.2d 729 (1978), the Court reversed a conviction of interfering with a police officer where the evidence showed that appellant threatened or used physical force when an arrest was attempted. Also, see *State v. Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980), where the Court held that appellant was once more mischarged under § 5-54-104, a § 5-54-103 (resisting arrest) charge being appropriate because the law enforcement officers were performing no duty other than arresting appellant when they were fired upon. Fi-

nally, citing the commentary to §§ 5-54-103, -104, the Court held in *Price v. State*, 276 Ark. 80, 632 S.W.2d 429 (1982), that “the offense of interference applies only where a police officer is interfered with in the performance of his duty by someone other than whom the officer is trying to arrest.” *Price, supra*, at 82, 632 S.W.2d at 431. See, also, *Easterly v. State*, 8 Ark. App. 135, 648 S.W.2d 843 (1983); *Gilmer v. State*, 269 Ark. 30, 602 S.W.2d 406 (1980).

Self defense may be asserted to justify the use of physical force alleged to constitute an offense under §§ 5-54-103 and -104. See §§ 5-2-606, -607; the original commentary to § 5-54-103; *Lucas v. State*, 5 Ark. App. 168, 634 S.W.2d 145 (1982) (conviction of interference with law en-

forcement officer reversed); *Barnes v. State*, 4 Ark. App. 84, 628 S.W.2d 334 (1982) (conviction of second degree battery reversed); AMCI 4105.

See AMCI 2803 and 2804.

Original Commentary to § 5-54-105

Section 5-54-105 is a descendant of the common law concept of accessories after the fact, but departs markedly from the common law tradition in a number of ways. Former statutory law codified common law to a great extent. See prior law formerly codified as Ark. Stat. Ann. § 41-120 (Repl. 1964) (Accessory after the fact). As is apparent from its title, the concept was based on the notion that an accessory after the fact was an accomplice to a crime already committed. See, e.g., *Stevens v. State*, 111 Ark. 299, 163 S.W. 778 (1914). At common law, this theory of liability resulted in several anomalies:

"[I]t was necessary to prove that the principal offense had been committed and that the accessory knew that the person he aided was the guilty perpetrator; the accessory could not be tried before the principal, and was therefore immune if the principal died or made good his escape; acquittal of the principal barred conviction of another as accessory; the accessory after the fact might be punished as severely as the principal offender." *M.P.C. § 242.3, Comment at 195 (Tent. Draft No. 9, 1959)*.

Despite the fact that Arkansas, like most other jurisdictions, had abolished most of these absurd possibilities by legislation, the Commission felt it appropriate to make a sharp break with traditional lines of thinking and treat the hinderer as an obstructor of justice rather than as an accessory.

Earlier law required that the actor have "full knowledge" of the crime committed by the person assisted. See former Ark. Stat. Ann. § 41-120. The Code formula-

tion, on the other hand, speaks in terms of the actor's purpose rather than the certainty of his knowledge respecting the consummated crime. Both prior law and the Code prohibit hindering efforts to apprehend misdemeanants as well as felons. Former law enjoined "concealing," "harboring," or "protecting." Section 5-54-105 is more inclusive and specific. Besides covering "concealing and harboring" it specifically forbids rendering other types of assistance that are frequently given fugitives.

The present grading scheme derives from treatment of this form of conduct as accessorial. See, prior law formerly found at Ark. Stat. Ann. § 41-121 (Repl. 1964). Prior to the Code's enactment, Arkansas was one of only three states that permitted an accessory after the fact to be punished as severely as the principal. *M.P.C. § 242.3, Comment at 201 (Tent. Draft No. 9, 1959)*. As originally enacted and as amended by Act 360 of 1977, the Code mitigates this harshness somewhat by providing that hindering is at most a class B felony — and then only if the person unlawfully assisted has committed a class A felony. Under other circumstances, hindering is graded one class below that of the offense of the person unlawfully aided.

The section adheres to previous legislative policy by mitigating liability upon a showing that the actor and the person assisted are related in expressed degrees. Cf. prior law formerly found at Ark. Stat. Ann. § 41-121 (Repl. 1964), exempting certain relatives from liability so long as they did not resist a lawful arrest.

1988 Supplementary Commentary to § 5-54-105

Knowledge of Hinderer and Liability for Volunteering

In *Workman v. State*, 267 Ark. 103, 589 S.W.2d 21 (1979), having pointed out circumstances indicating that appellant knew what conduct the actor had engaged in and that he had committed "an offense,"

the Court held that appellant's purpose to hinder prosecution supported a conviction of a class B felony, no proof of her knowledge of the *exact offense* committed being required. Former law at Ark. Stat. Ann. § 41-120 (Repl. 1964) required that a hinderer have "full knowledge" of the crime

committed. *Workmen* is consistent with legislative intent on this point. See original commentary to § 5-54-105.

It should also be noted that the Court found as follows in *Workman*:

Here appellant's statements to the police were, in the words of our statute, a mere continuation of her effort to "conceal[s], alter[s], destroy[s], or otherwise suppress[es] the discovery . . . of any fact, information or other thing related to the crime which might aid in the discovery, apprehension, or identification of the person;" and to "volunteer[s] false information to a law enforcement officer." § 5-54-105(a)(4), (6). *The deliberate act of making false statements to the police concerning Pace's activities the night of the robbery is the essence of the alleged criminal offense and not a confession.*

Id. at 106, 589 S.W.2d at 22 (emphasis added).

Though the opinion is not clear on this point, appellant's statements may have

been made in the course of questioning by the police. If so, the Court's language in regard to § 5-54-105(a)(6) may be overly broad, the drafters' intent being to punish the *volunteer* who deliberately seeks out and lies to law enforcement officers, not one who falsely responds in the course of questioning.

Also, see *Comment*, 31 Ark. L. Rev. 100, 112-17 (1977).

Acquittal of Person Protected No Defense

That the disposition of the prosecution of the person aided in violation of § 5-54-105 is irrelevant insofar as the guilt of the hinderer is concerned is illustrated by *Rowdean v. State*, 280 Ark. 146, 655 S.W.2d 413 (1983). There, in a joint trial, Mrs. Rowdean was convicted of first degree murder and her husband was convicted of hindering under § 5-54-105. Mr. Rowdean's conviction was summarily affirmed after the Court in the same opinion reversed his spouse's conviction.

See AMCI 2805.

Original Commentary to § 5-54-106

This section is patterned after M.P.C. § 242.4. It is designed to cover the situation where the actor cannot be convicted under § 5-54-105 because his primary

purpose was to obtain a share of the proceeds of the crime rather than to hinder apprehension of the principal offender.

1988 Supplementary Commentary to § 5-54-106

See AMCI 2806, 2806-P.

Original Commentary to § 5-54-107

Section 5-54-107 deals with circumstances under which one person either expressly or impliedly agrees with another that in consideration of receipt of something of value the first party will not report an offense committed by the paying party. The section reaches conduct that does not constitute hindering apprehension or prosecution (§ 5-54-105) because the latter offense is defined so as to require affirmative efforts to conceal evidence of a crime or its perpetrator.

Former Arkansas statutory law on compounding was obviously the offspring of common law doctrine. It was found at Ark. Stat. Ann. § 41-2813, 2814 (Repl. 1964). To fall within the purview of prior authority, one must have had "knowledge of the

actual commission of ...any felony..." former Ark. Stat. Ann. § 41-2813 (emphasis added). Section 5-54-107 does not speak in terms of "knowledge" or whether the offense in question was actually committed. Liability arises as a result of soliciting, accepting, or agreeing to accept any pecuniary benefit as consideration for refraining from reporting the commission or *suspected* commission of any offense. Section 5-54-107 also brings within its ambit both parties to the proscribed transaction. Additionally, under a new differential grading scheme supplied by Act 360 of 1977, punishment is apportioned according to the gravity of the offense compounded.

The analogous Model Penal Code provi-

sion exempts from liability a victim who accepts any pecuniary benefit believed to be due as restitution or indemnification. See, M.P.C. § 242.5. Prior law did not offer this exemption and neither does § 5-

54-107. The result is that a victim cannot, without the prosecuting attorney's approval, strike a bargain with the crime's perpetrator and thereby thwart prosecution.

1988 Supplementary Commentary to § 5-54-107

See AMCI 2807, 2807-P.

Original Commentary to § 5-54-108

This provision probably does no more than codify former Arkansas law. See, prior law formerly found at Ark. Stat. Ann. § 41-122 (Repl. 1964); *Rush v. State*,

239 Ark. 878, 395 S.W.2d 3 (1965); and *State v. Jones*, 91 Ark. 5, 120 S.W. 154 (1909).

1988 Supplementary Commentary to § 5-54-108

See AMCI 2808.

Original Commentary to § 5-54-109

Section 5-54-109 constitutes recognition of the need for the common law posse comitatus. Preexisting authority in Arkansas is found at Ark. Stat. Ann. §§ 42-202, 42-204; 43-415 (Repl. 1964). Section 42-202 permitted a law enforcement officer reasonably apprehensive of resistance to execution of process to summon the assistance of "male inhabitants" of a county in order to overcome such resistance. Section 42-204 provided, tautologically, that a "lawful excuse" will exonerate one who declines the officer's command. The continuing vitality of posse comitatus under §§ 42-202, 42-204, was recently authoritatively announced. *Williams v.*

State, 253 Ark. 973, 490 S.W.2d 117 (1973). Section 43-415 permitted any officer making an arrest to summon as many persons as he deems necessary to assist him in making the arrest. Failure to comply without "reasonable excuse" created misdemeanor liability.

Section 5-54-109 substantially parallels preexisting law. The defendant must be shown to have known that the person requesting assistance was a law enforcement official. This proof requirement, though not expressed in previously enacted statutes, would probably have been judicially imposed if the issue had arisen.

1988 Supplementary Commentary to § 5-54-110

See AMCI 2810.

1988 Supplementary Commentary to § 5-54-111

See AMCI 2811.

Original Commentary to § 5-54-112

Sections 5-54-110 to -112 define escape offenses in order of descending seriousness. The sections are patterned after Oregon Proposed Code §§ 190-192 and correlate severity of punishment with risk of harm created by the escape. Grading is

based on three factors: (1) the use of force; (2) the type of confinement from which the escape is made; and (3) the seriousness of the offense that led to confinement. Former law respecting escapes recognized the same factors but did not always take

them into account in setting penalties. See prior law formerly found at Ark. Stat. Ann. § 41-3508 (Repl. 1964) (escape from penitentiary — no force required); § 41-3510 (Supp. 1973) (attempt at escape — force or violence required); § 41-3513 (Supp. 1973) (escape or attempt to escape from officer or place of confinement — no force or violence required).

Third Degree Escape

The least risk is created by the person who escapes from custody without using force. "Custody," of course, is defined in terms of "restraint by a law enforcement officer pursuant to an arrest or court order, but does not include detention in a correctional facility." § 5-54-101(2). Consequently, a person commits third degree escape when he absconds from an officer after an arrest and before incarceration or while in transit between jail and court. A person cannot be convicted of third degree escape unless the custody was lawful. Prior law extended this requirement to all escapes. See, former Ark. Stat. Ann. § 41-3510 (Supp. 1973); *Akins v. State*, 253 Ark. 273, 485 S.W.2d 535 (1972); and *Harding and Hilderbrandt v. State*, 248 Ark. 1240, 455 S.W.2d 695 (1970). Permitting a defense of unlawful arrest in the case of third degree escape does not undercut the general Code policy against the use of force to resist an unlawful arrest (§§ 5-2-612 and 5-54-103) since third degree escape involves non-forcible conduct.

Second Degree Escape

Second degree escape involves more dangerous conduct; use or threat of force,

escape of a convicted felon, or nonforcible escape from a correctional facility.

"Factors that raise the offense to second degree escape represent additional risk-producing elements:

"(1) Escape from a correctional facility evidences increased planning and premeditation. Such conduct threatens the security of correctional facilities by increasing the risk of escapes by other inmates.

"(2) A person convicted of a felony is more apt to create harmful social consequences by escape. A convicted felon may have more incentive to escape and, therefore, a stronger deterrent is required.

"(3) The use of force in escapes obviously increases the hazards imposed on those obligated to resist such conduct." Oregon Proposed Code §§ 190-192, *Commentary at 194, 195*.

No counterpart to the "unlawful custody" defense is offered by this section. The conduct constituting second degree escape is too serious to be justifiable on those grounds.

First Degree Escape

First degree escape entails the most serious risk of all. No distinction is drawn between types of confinement; escapes from custody and correctional facilities are treated the same. Instead, the aggravating factor is the use of a deadly weapon or, alternatively, the use of physical force when assisted by another person actually present. As is the case with escape in the second degree, the unlawfulness of the custody or confinement is no defense.

1988 Supplementary Commentary to § 5-54-112

Conduct Constituting Escape From Custody

In *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985) appellant was arrested on charges of possession of marijuana and hunting deer with a modern firearm during muzzle-loading season. He asked for and received permission to get his dogs, which were apparently still in the woods. He left and did not return. At trial, one of the arresting officers testified that he told appellant that he could get his dog. The court found that "implicit in both the

request and approval, however, was the timely return of the appellant, Blair, with or without his dogs." 16 Ark. App. at 9, 696 S.W.2d at 759. The Court found that the evidence presented a question for the jury, and it upheld the jury's guilty verdict. The result appears correct. Section 5-54-101(2) defines "custody" as "actual or constructive restraint." "Escape" is defined by subsection (3) as "unauthorized departure ... from custody."

See AMCI 2812.

1988 Supplementary Commentary to § 5-54-113

See AMCI 2813.

Original Commentary to § 5-54-114

Sections 5-54-113, -114 are addressed to guards and law enforcement officials charged with supervisory duties regarding persons detained in correctional facilities. If such an official knowingly permits a prisoner charged with or convicted of a felony to escape, § 5-54-113 subjects him to class C felony accountability. Section 5-54-114 deals with reckless conduct and imposes misdemeanor liability on the jailer who recklessly permits *any* person to escape.

Earlier law was in harmony with the Code since it provided felony liability for permitting the escape of a person confined to the state penitentiary. See, prior law previously codified as Ark. Stat. Ann. § 41-3501 (Repl. 1964). Misdemeanor liability was prescribed by former Ark. Stat.

Ann. §§ 41-3505, 41-3506 (Repl. 1964) upon private persons and jail personnel who permitted escapes by prisoners either from custody or from correctional facilities other than the state penitentiary. The Code is more stringent than was prior authority in that knowingly allowing the escape of a person charged with or convicted of a felony is itself a felony irrespective of whether his departure is from the state penitentiary or merely from police custody or a local jail. Lastly, it will be noted that the breadth of the definition of "correctional facility" extends this provision's coverage to facilitating or permitting the escape from the Arkansas state hospital of persons charged with or convicted of crimes.

1988 Supplementary Commentary to § 5-54-114

See AMCI 2814.

Original Commentary to § 5-54-115

Section 5-54-115 speaks to the jailer's counterpart at a juvenile training school or the Arkansas state hospital. Low grade misdemeanor exposure results when an inmate is recklessly permitted to make an unauthorized departure. Previously, there was no Arkansas statutory provision precisely addressed to this subject, although Ark. Stat. Ann. § 45-238 (Repl. 1964) deals obliquely with the problem. Its provisions are applicable to "any person who shall interfere with the ... disposition of any child under any order of the (juvenile)

court...." The only sanction imposed by the statute is the possibility of contempt liability. It should be observed that the state hospital inmate who is charged with or convicted of an offense is incarcerated in a correctional facility for the purposes of this section. See, § 5-54-101(a) and Commentary thereto. Consequently, the hospital employee who allows an inmate in this special status to flee can be convicted of permitting escape under §§ 5-54-113, -114.

1988 Supplementary Commentary to § 5-54-115

See AMCI 2815.

Original Commentary to § 5-54-116

This provision applies to all persons who are not inmates, whether or not employed at the mentioned institutions. As is the case with § 5-54-116, this section establishes a new offense. Aiding an unauthorized departure gives rise to serious felony liability if physical force is used or a

deadly weapon employed. Otherwise serious misdemeanor liability accrues. Again, it must be kept in mind that inmates charged with or convicted of criminal offenses are deemed to be confined in a correctional facility. See, Commentary to § 5-54-114.

1988 Supplementary Commentary to § 5-54-116

See AMCI 2816, 2816-P.

1988 Supplementary Commentary to § 5-54-117

See AMCI 2817, 2817-P.

Original Commentary to § 5-54-118

Sections 5-54-117, -118 deal respectively with providing weapons or tools designed to facilitate escapes and unauthorized departures. Both sections feature differential grading schemes, the determinant being whether the implement furnished or provided is a deadly weapon. Note that "implement for escape" and "implement for unauthorized departure" are defined *supra* at § 5-54-101(5) and (6). *Cf.* prior authority formerly codified as Ark. Stat. Ann. § 41-3511 (Repl. 1964) (convey-

ing instruments to jail); § 41-3512 (Repl. 1964) (officer permitting introduction of instruments).

Persons who might have heretofore been charged under this section for furnishing a weapon may now be charged instead under § 5-54-119, as amended by Act 360 of 1977. Section 5-54-119 imposes class B felony liability for introducing a weapon into a correctional facility or providing an inmate with a weapon.

1988 Supplementary Commentary to § 5-54-118

See AMCI 2818, 2818-P.

Original Commentary to § 5-54-119

The offense of furnishing prohibited articles was redefined by Act 360 of 1977 to permit grading geared to the danger created by the article introduced. Thus, furnishing a weapon is a class B felony, while furnishing alcohol or drugs is a class D felony. Furnishing more innocuous items is a class A misdemeanor. For definitions,

see § 5-54-101(10). *Cf.* prior law formerly found at Ark. Stat. Ann. § 41-3109 (Repl. 1964) (smuggling firearms, intoxicants and narcotics into penal institutions); § 46-166 (Repl. 1964) (furnishing liquor to convict); § 46-168 (Repl. 1964) (carrying mail to or from convicts).

1988 Supplementary Commentary to § 5-54-119

See AMCI 2819.

Original Commentary to § 5-54-120

Section 5-54-120 closely parallels former law previously codified as Ark. Stat. Ann. § 43-723.1 (Supp. 1973) prohibiting bail jumping. Felony liability arises if the required appearance was to answer a felony charge or for disposition of such a charge either before or after

determination of guilt. Section 5-54-120(a) also encompasses situations where the accused has been cited or summoned pursuant to the provisions of the Rules of Criminal Procedure. See Ark. R. Crim. P. 5, 6. "Reasonable excuse" is a defense as, in effect, it was under prior law.

1988 Supplementary Commentary to § 5-54-120

Effect of Advice of Counsel

One who flees on advice of counsel violates this section and cannot escape conviction on grounds of ineffective representation, since advice to commit a crime is not representation with respect to that offense. *Atkins v. State*, 287 Ark. 445, 701 S.W.2d 109 (1985).

Reasonable Excuse

A defendant who admits himself to a

hospital in another jurisdiction shortly before trial without notice to his attorney or the Court and who does not at his subsequent trial offer any medical evidence on condition he was suffering from commits an offense under § 5-54-120. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

See AMCI 2820.

Original Commentary to § 5-54-121

This section is based on M.P.C. § 241.8. It proscribes various activities that culminate in false or incomplete public records. Prior law on the subject was not comprehensive and appeared to be primarily concerned with protecting persons who might be defrauded or otherwise injured by misleading records. See, prior law formerly codified as Ark. Stat. Ann. § 41-1935 (Repl. 1964) (placing of record with intent to discredit title); § 41-2815 (Repl. 1964) (taking or destruction of record); § 41-2816 (Repl. 1964) (stealing or avoiding

record or process). As a result, these statutes prescribed severe penalties. Like the other provisions in this chapter, § 5-54-121 is primarily designed to ensure the integrity and efficiency of governmental operations. Misdemeanor liability seems sufficient to promote this purpose. If the person who tampers with public records does so as part of a broader scheme to defraud another, he can be prosecuted for forgery. See, § 5-37-201(c)(2). *Cf.*, § 5-53-111 (tampering with physical evidence).

Original Commentary to § 5-60-101

This section is designed to cover not only sexual assaults on dead human bodies but also lesser forms of mishandling, abuse, or even neglect. Its former statutory counterpart was found in old Ark. Stat. Ann. §§ 41-3701 (removal of body from grave), 41-3702 (purchasing body), 41-3703 (Repl. 1964) (opening grave). The primary purpose of the section is to protect the feelings of the family of the deceased person. Although opening a grave

to steal jewelry is probably covered by the section, such conduct is more appropriately prosecuted as theft. See, § 5-36-103.

Use of the phrase "except as authorized by law" excludes from the statute's ambit the various lawful acts that may be done to a dead human body. The exception incorporates by general reference statutes authorizing autopsies, embalming, and the use of bodies for medical and scientific purposes.

1988 Supplementary Commentary to § 5-60-101

See AMCI 2920.

Original Commentary to § 5-62-101

Section 5-62-101 is designed to simplify current authority on this subject and is largely self-explanatory. The words "except as authorized by law" exempt those types of activities permitted by laws respecting the hunting and trapping of wild animals.

For pre-existing law, see Ark. Stat. Ann.

§§ 41-401, et seq. (Repl. 1964). Since § 5-62-101 does not attempt to deal in a comprehensive fashion with protection of animals, numerous provisions in present law conferring special authority on local humane societies have not been repealed. See, §§ 5-60-114, 5-62-118 to -119, 5-62-110 to -117.

1988 Supplementary Commentary to § 5-62-120

Amendments

Act 285 of 1983 simply added abandonment of an animal to the statute's prohibition.

Act 862 of 1981 seeks to deter dog

fighting as a sport by penalizing as an unclassified misdemeanor conduct ranging from promotion to mere witnessing of fights.

See AMCI 2918.

Original Commentary to § 5-62-122

Section 5-62-122 is a single comprehensive statute that prohibits owners or custodians of farm animals from allowing such animals to run at large. It replaces a surprising array of current statutes directed at particular animals or localities. See, prior law previously Ark. Stat. Ann. § 41-430 (Repl. 1964) (animals at large on

public highway); § 41-433 (Repl. 1964) (permitting goats and hogs to run at large in Archey Valley Township, Van Buren County); § 41-433.1 (Supp. 1973) (livestock running at large in Van Buren County); § 41-434 (Supp. 1973) (hogs running at large).

Original Commentary to § 5-70-101

"Sexual activity" is defined by reference to three terms used in Chapter 14 (Sexual Offenses). As with most revised codes, the definition speaks in terms of both male and female participants and heterosexual and homosexual conduct.

"Advances prostitution" and "profits from prostitution" are new terms laying the foundation for greatly simplified statutory provisions. "Advancing prostitution" encompasses the most common ways of promoting prostitution, thus eliminating the need for distinct statutes on procuring, transporting, etc. Pecuniary gain, which is not a necessary ingredient of

advancing prostitution, is the touchstone of "profiting from prostitution." The latter term does not include the person who provides goods or services to a prostitute, knowing the source of the prostitute's earnings; it only encompasses those who, pursuant to an agreement, receive compensation as a direct result of prostitution activity. Prostitutes and patrons are excluded from both definitions since their conduct is specifically covered by separate offenses.

"Physical force" is defined here, as elsewhere in the Code, in a broad sense and includes the threat of harm to the victim.

1988 Supplementary Commentary to § 5-70-101

"Sexual activity" is defined by reference to the terms "sexual intercourse," "deviate sexual activity," and "sexual contact."

Cases construing the three latter terms are discussed in the supplementary commentary to § 5-14-101.

Original Commentary to § 5-70-102

A number of august authorities, including a select committee of the American Bar Association, have recommended that prostitution be decriminalized. Admittedly, the criminal law is, at most, a neutral factor in solving the problem, and routine punishment will not alter the basic pattern of conduct. The rationale for intervention offered by the Model Penal Code is that prostitution may be a significant factor in the determination of social values. While this is certainly an overly broad and exaggerated premise, it does reflect the widespread concern for a solution to the problem. On balance, the Commission concluded that the use of criminal sanctions is still the most appropriate way to deal with the problem of prostitution, not so much because prostitution per se poses any danger to the public, but because the concomitants of prostitution — *e.g.*, venereal disease, drug addiction, coercion, and public annoyance — are legitimate concerns of the criminal law. Furthermore, prostitution is often symptomatic of deeper sociological and psychological problems, and criminal

sanctions provide a basis for bringing the prostitute into contact with remedial and rehabilitative services.

The offense is defined rather simply in comparison with former law. See prior law formerly found at Ark. Stat. Ann. § 41-3202 (Repl. 1964). The "fee" requirement assures that only commercialized sex will be penalized. The "lewdness" and "assignation" phraseology of prior law is eliminated, avoiding possible unconstitutional invasion of privacy. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). Due to the broad definition of "sexual activity," the section proscribes both heterosexual and homosexual conduct and applies to both male and female prostitutes. Use of the words "agrees or offers to engage in" makes it unnecessary for the act to be completed in order to constitute an offense.

The offense is graded a class C misdemeanor in recognition that criminal sanctions in this area are designed to serve purposes in addition to deterrence.

1988 Supplementary Commentary to § 5-70-102

On two occasions since the enactment of the Code the General Assembly has found it necessary to increase the penalties for violation of this section. An offense which was punishable as a class C misdemeanor (maximum of 30 days imprisonment and/or \$100 fine) when originally enacted

is now punishable as a class B misdemeanor (maximum of 90 days imprisonment and/or \$500 fine) for a first offense and as a class A misdemeanor (maximum of one year imprisonment and/or \$1,000 fine) for a second or subsequent offense.

Original Commentary to § 5-70-103

The previous prohibition against patronizing a prostitute was embodied in old Ark. Stat. Ann. § 41-3202 (Repl. 1964), the general prostitution and soliciting statute. Such a provision was not common and where it was present, enforcement was usually lax due to the reluctance of law enforcement officers to arrest patrons. However, once the decision was made to

criminalize prostitution, it was difficult to justify excluding one of the necessary parties to the offense from liability. In addition, the threat of arrest and conviction has a greater deterrent effect on the patron than on the prostitute and can be used to encourage customer cooperation with prosecuting authorities seeking to stem large-scale prostitution operations.

Finally, subjecting the customer to the same penal sanctions (class C misdemeanor) may indirectly facilitate the rehabilitation of the prostitute by demonstrating the lack of discrimination in the enforcement of the law.

Some authorities contend that laws directed against patronizing allow the patron to be coerced by fear of prosecution into remaining silent concerning illegal activities incidental to prostitution, *e.g.*, blackmail, robbery, or "rolling." However,

the Commission found this risk insubstantial when compared with the overall effectiveness of such statutes in discouraging prostitution.

Subsection (a)(2) effectively protects the public from the annoyance of solicitation and the outrage that some persons' moral sensibilities might suffer as a consequence. It also makes it clear that sexual activity need not occur in order to constitute the offense.

1988 Supplementary Commentary to § 5-70-103

There have been no reported cases under this section. For the reasons stated in the original commentary to the section, the drafters of the Code chose to impose on the patron of a prostitute the same penal sanctions as were imposed on the prostitute by grading both offenses as class C misdemeanors. When the General Assembly enhanced the punishment for prostitution by upgrading the offense to a class B misdemeanor (class A in the case of a repeat offender), it made no corresponding change in the penalty applicable

to the patron, thereby implicitly rejecting the reasoning of the original commentary.

It should be noted that the prosecution probably does not have the option of charging the patron of a prostitute with solicitation to commit prostitution under § 5-3-301 since the offense of prostitution is defined in § 5-70-102 so that the conduct of the patron is inevitably incident to its commission. *See* § 5-3-103(a)(2) prohibiting a prosecution for solicitation in such a circumstance.

Original Commentary to § 5-70-104

The three sections on promoting apply to persons other than prostitutes who "profit" from and "advance" prostitution, as these terms are defined in § 5-70-101. All of the conduct formerly enumerated in the so-called "pandering" statutes is condensed into one of the three degrees of promoting prostitution. Punishment ranges from a class D felony for first degree promotion to a class B misdemeanor for third degree promotion, depending upon the age of the prostitute and the nature of the defendant's role in the prostitution activity.

Promoting prostitution in the first degree is the only felony in the chapter and is designed to protect minors and discourage the most reprehensible forms of procuring and promoting: those involving the use or threat of physical force. Minors of each sex will be specifically protected from promoting activities. Previously, only female minors were covered. *See* prior law formerly codified as Ark. Stat. Ann. § 41-3217 (Repl. 1964).

1988 Supplementary Commentary to § 5-70-104

The term "intimidation," which is used in this section, is not defined in the Code. It appears in the definition of at least one other offense. *See* § 5-54-105(a)(3). The term is presumably designed to encompass forms of coercive conduct less threatening than "physical force," a term that is defined and used extensively throughout the Code. The person who compels an-

other to engage in prostitution by the use of "physical force" may well be guilty as an accomplice to rape since the "forcible compulsion" that is an essential element of rape is defined to include "physical force." *See* § 5-14-103 and § 5-14-101(2). The person who employs the services of a prostitute under such circumstances might find himself charged with rape (a class A

felony) rather than patronizing a prostitute (a class C misdemeanor) if it could be shown that he was aware of the physical force used against his partner.

The decision in *Parker v. State*, 270 Ark. 3, 603 S.W.2d 393 (1980) sheds some light on the degree of coercion required to constitute promoting prostitution in the first degree. There the Court held that the statement "if you leave you're going to get into trouble" coupled with testimony by the victim that she was afraid to leave the defendant's residence was sufficient to sustain a conviction of promoting prostitution. Though the issue is not free from doubt, such a statement standing alone

would probably not be sufficient to constitute the "forcible compulsion" required to convict of rape. See the discussion of decisions interpreting "forcible compulsion" in the commentary to § 41-1801.

In *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977) the Court characterized this offense as one defining a continuing course of conduct. The effect of such characterization is that a defendant can be convicted of only one offense arising out of the (1) *same* (2) *uninterrupted* course of conduct. See § 5-1-110(a)(5) and original and supplementary commentary to this subsection.

Original Commentary to § 5-70-105

This section deals with the problem of houses of prostitution and prostitution "rings." There is no requirement that the accused receive compensation for his activity, but no longer will it be an offense to simply reside in a house of prostitution,

thus ensuring that persons will not be prosecuted unless proof of illicit conduct is available. *Cf.* earlier authority formerly found at Ark. Stat. Ann. § 41-3205 (Repl. 1964).

Original Commentary to § 5-70-106

Subsection (a)(1) provides law enforcement officials with the leverage necessary to force private abatement of a house of prostitution. It is also useful when proof problems make it difficult to show the deeper involvement necessary to constitute advancing or profiting from prostitution.

Under subsection (a)(2), the presence of any of the activities enumerated in the definitions of "advances prostitution" and "profits from prostitution," will constitute promoting in the third degree. Since this is a lesser included offense of more serious types of promoting, it should be a useful tool in the plea bargaining process.

1988 Supplementary Commentary to § 5-70-106

The only significant development regarding this section has been the Court's characterization of this offense as one

defining a continuing course of conduct. See the discussion in the supplementary commentary to § 5-70-104.

Original Commentary to § 5-71-101

Section 5-71-101 defines terms employed by this chapter, all but two of which are explained in Commentary to other sections as follows: for "deviate sexual activity," see Commentary to § 5-14-101; "governmental function," § 5-54-101; "occupiable structure," § 5-39-201; "property," § 5-38-101; "vehicle," § 5-2-601; "vital public facility," § 5-38-101.

Several offenses in this chapter provide that particular conduct is criminal only if committed in a public place. As set out in

subsection (6), the "public" character of a place is determined by the use to which it is put, not by the nature of its ownership. Any locality, publicly or privately owned, which is open to the general public or substantial numbers thereof is a "public place." Consequently, a private office in a public building is not a public place, but the bar at a private club is. The same definition of "public place" is used in the chapter on sexual offenses. See, § 5-14-101(6).

“Public building” (§ 5-71-101(7)) appears in the offense of defacing a public building. Its definition is self-explanatory.

1988 Supplementary Commentary to § 5-71-101

See AMCI 2901.

1988 Supplementary Commentary to § 5-71-201

See AMCI 2902.

1988 Supplementary Commentary to § 5-71-202

See AMCI 2903.

1988 Supplementary Commentary to § 5-71-203

See AMCI 2904, 2904-P.

Original Commentary to § 5-71-204

Sections 5-71-201 to -204 are associated provisions concerned with riotous behavior. Review of earlier authority does not disclose an absence of legislative concern with this matter. Two definitions of “riot” appeared. See prior law formerly found at Ark. Stat. Ann. §§ 41-1402, 41-1408 (Repl. 1964). Another provision gives municipalities authority to enact further ordinances bearing on the subject. Ark. Stat. Ann. § 19-2401 (Repl. 1968). Still other statutes define the duties of mayors, chiefs of police, police officers, watchmen, sheriffs, deputies, magistrates, and constables in riot contexts. Ark. Stat. Ann. §§ 19-1702, 19-1705 (Repl. 1968); 26-210 (Repl. 1962); and 42-206, 42-207, 42-209, 42-211 (Repl. 1964.)

Former Ark. Stat. Ann. § 41-1402 (Repl. 1964), adopted in 1838, substantially restated the common law offense of “riot.” Its elements are (1) an agreement by three or more persons; (2) to do an unlawful act against the peace or to the terror of the public; (3) with force or violence; (4) accompanied by a violent or turbulent unlawful act in furtherance of the agreement. In 1868 the legislature enacted Ark. Stat. Ann. § 41-1408 (Repl. 1964), which defined “riot” as the doing of a lawful or unlawful act, by one or several persons, upon the person or property of another with force or in a violent or tumultuous manner. This expansive definition applied to virtually any violent con-

duct by an individual, thus reaching behavior that is more appropriately punished as battery (§§ 5-13-201 to -203); assault (§§ 5-13-204 to -207); criminal mischief (§§ 5-38-203, -204); or disorderly conduct (§ 5-71-207).

Section 5-71-201 sets out a definition of “riot” designed to return the concept to its common law origins—i.e., an offense directed at disorderly conduct by a group rather than by an individual. With some modification, it parallels the definition previously found in former § 41-1402. The common law requirement that it takes three or more persons to constitute a riot is retained. However, the necessity for an agreement is relaxed somewhat; the prosecution need only show that the defendant, whether by prearrangement or spontaneously, acted jointly with at least two other persons. Section 5-71-201 does not require that the participants intend to commit a particular unlawful act. The gravamen of the offense is stated more specifically—creating a situation that threatens the public peace, performance of a government function, or the safety of property or persons. Stated in these terms, the offense is more closely aligned with the popular conception of “riot.” It should also be observed that, as in old § 41-1402, the risk to public peace, governmental function, or persons or property must result from the *violent* conduct of the participants. A peaceful protest is

not a riot even if it is likely to provoke a violent response from bystanders.

Aggravated riot, as defined by § 5-71-202, involves committing riot while possessing a deadly weapon or knowingly acting jointly with one who does. The Commission viewed such conduct as sufficiently dangerous to warrant felony grading.

The language of § 5-71-203 is similar to that of prior authority formerly codified as Ark. Stat. Ann. § 41-1445 (Supp. 1973) and is designed to prevent instigation or furtherance of riot while, at the same time, heeding appropriate constitutional requirements applicable to statutes directed at speech and related conduct. See, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969); *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951); *Schneider v.*

State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939). Cf., *Schnecke v. United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); *Gitlow v. New York*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925). Felony liability is imposed if physical injury to a person results from the proscribed conduct.

Providing deadly weapons or explosives or instructing others as to their preparation or use in the context of a riot is prohibited by § 5-71-204. This provision authorizes severe punishment for acts but for which riotous conduct might not take place or might at least assume a less destructive form. It also takes account of the fact that while the armed rioter might choose not to employ his weapon, one who arms numbers of persons unleashes a force over which he immediately loses control.

1988 Supplementary Commentary to § 5-71-204

See AMCI 2905.

Original Commentary to § 5-71-205

Section 5-71-205, in effect, defines an inchoate form of "riot." The crime is committed if a person having the purpose of engaging in a riot "assembles" with two or more persons. This section is broader than its prior analogue in Arkansas law, former § 41-1402 (Repl. 1964), in that no conduct other than the act of assembling need be proved to support a conviction under § 5-

71-205. Prior section 41-1402 prohibited any assembly for the purpose of engaging in an unlawful act. Section 5-71-205 is limited to gatherings designed to culminate in a riot; assemblies for the purpose of engaging in crimes other than riot can be adequately dealt with otherwise. See, §§ 5-2-403 (accomplice liability); 5-3-401 (conspiracy).

Original Commentary to § 5-71-206

Former law in this area was found in Ark. Stat. Ann. §§ 41-1403, 42-206, 42-207, 42-211 and 42-212 (Repl. 1964). Section 41-1403 was broadly phrased, extending to the failure to disperse of persons assembling together for the purpose of committing "any unlawful act." The language of § 5-71-206 is specifically confined to the riot or unlawful assembly situation. Use of the term "knowing" protects persons who did not know that an order to disperse had been given. Section 5-71-206 is broader in scope than former § 41-1403 to the extent that it reaches persons not actively engaged in committing the offense of riot or unlawful assem-

bly but who fail to disperse upon a lawful order by a law enforcement officer. Earlier law did not make it an offense for a bystander at a riot or unlawful assembly to fail to disperse.

Subsection (b) provides a special defense to news media representatives present at the scene of a riot or an unlawful assembly and acting on behalf of news media. A reporter is permitted to interpose as a defense the fact that he did not comply with an order to disperse because by his presence he did not knowingly obstruct efforts by a law enforcement officer to control the situation at hand.

Original Commentary to § 5-71-207

Section 5-71-207 defines the multi-faceted offense of disorderly conduct. It embraces conduct prohibited by several previous statutes. Among the latter were statutes previously codified as Ark. Stat. Ann. §§ 41-1401, 41-1402, 41-1404, 41-1405, 41-1409, 14-1412, 41-1415, and 41-1416 (Repl. 1964). As with § 41-2902, the prohibitions of § 5-71-207 have been drafted with an eye to avoiding the related vices of vagueness and overbreadth. Against the background of authority such as *Neal v. Still*, 248 Ark. 1132, 455 S.W.2d 921 (1970); and *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954), § 5-71-207 is cast in language giving a person of ordinary intelligence fair notice of what conduct is prohibited and what will be countenanced. Such phrasing should ensure that the section will not result in arbitrary and erratic arrests or convictions. Additionally, it will be observed that the section does not create a strict liability offense. The conduct prohibited by subsections (a)(1)-(9) is not criminal unless engaged in for the purposes specified in the introductory language of the section.

Section 5-71-207(a)(1) takes up in part the subjects addressed by old Ark. Stat.

Ann. §§ 41-1401, 41-1404, 41-1405; § 5-71-207(a)(2), old § 41-1401 [cf., *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)]; § 5-17-207(a)(3), old §§ 41-1401, 41-1409, 41-1412, and 41-1415 [see, *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)]; *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); and *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973); § 5-71-207(a)(4), old §§ 41-1401, 41-1416; § 5-71-207(a)(5), old § 41-1401 [cf., *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971)]; § 5-71-207(a)(6), old § 41-1403; (cf., § 42-212.) [See, *Colton v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)]; § 5-71-207(a)(7), old § 41-1401; and § 5-71-207(a)(8), old §§ 41-1701 et seq. (Repl. 1964) [see, *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974); and *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969)]. Subsection 5-71-207(a)(9) is intended to discourage "streaking" and similar activities not within the purview of § 5-14-112 (indecent exposure) because the purpose to arouse or gratify sexual desire is absent.

1988 Supplementary Commentary to § 5-71-207

In *Bousquet v. State*, 261 Ark. 263, 548 S.W.2d 125 (1977), the Court held § 5-71-207(a)(3) constitutional as applied to the conduct of appellant—cursing an off-duty police officer working in a department store. In so finding, the Court expressed disagreement with the holding of *Hammond v. Adkisson*, 536 F.2d 237 (8th Cir. 1976) that speech does not constitute

"fighting words" unless likely to arouse to violent anger the person to whom the words are addressed. *Hammond* at 239. The *Bousquet* Court, however, found it unnecessary to reconcile its decision with *Hammond* because the issue resolved in *Hammond* was not raised at trial in *Bousquet*.

Original Commentary to § 5-71-208

This section covers situations where disorderly conduct annoys or alarms an individual rather than the general public.

Subsection (a)(1) is aimed at conduct not causing sufficient danger or apprehension to constitute assault under §§ 5-13-204 to -207, or sufficient injury to constitute battery of any degree. Additionally, its coverage extends to physical contact which, though offensive, is not the result

of a purpose required for liability under battery and assault provisions. There was no earlier law comparable to subsection (a)(1), except, of course, statutes defining various types of assaults.

Subsection (a)(2) reaches the public use of obscene language or gestures calculated to alarm and likely to provoke a violent retaliatory response. The "fighting words" qualifications is necessary to prevent in-

fringement on constitutionally protected free speech. See, *Lucas v. State*, 254 Ark. 584, 494 S.W.2d 705 (1973), *vacated*, 416 U.S. 919, 94 S. Ct. 1917, 40 L. Ed. 2d 227 (1974); *Hammond v. State*, 255 Ark. 56, 498 S.W.2d 652 (1973).

Subsection (a)(3) is directed at a type of conduct that, at best, annoys the person who is its object and, at worst, may cause substantial fear or even panic.

Subsection (a)(4), like subsection (a)(2), is directed at abusive conduct highly likely to generate a violent response. See, *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 776, 86 L. Ed. 1031 (1942).

Subsection (a)(5) is a catch-all provision intended to reach forms of conduct not susceptible to statutory enumeration.

Original Commentary to § 5-71-209

This section, like §§ 5-71-207 and -208, proscribes annoying behavior. Like § 5-71-208, it addresses activity directed at particular individuals rather than the public at large. To the degree that the telephone can be an instrumentality of the offense, § 5-71-209 had counterparts in prior law formerly codified as Ark. Stat. Ann. §§ 41-1437, 41-1438 (Repl. 1964). Section 5-71-209 is of broader compass

than the former statute though in that it reaches all forms of written communication used for the proscribed purposes. Radio and television communication are federally regulated and consequently not covered. See, Proposed Massachusetts Code 269, § 5; and Proposed Michigan Code § 5535. See, also, 47 U.S.C.A. § 223 (1968).

1988 Supplementary Commentary to § 5-71-209

See AMCI 2910.

1988 Supplementary Commentary to § 5-71-210

See AMCI 2911, 2911-P.

Original Commentary to § 5-71-211

These sections, §§ 5-71-210 and -211, expand former law, which was found at Ark. Stat. Ann. §§ 41-4610, 41-4611 (Repl. 1964). Former sections 41-4610 and 41-4611 dealt solely with underground threats or warnings involving bombs or other explosives.

Section 5-71-210 governs false communication of an emergency when the actor knows his conduct is likely to have the named consequences. The grade of the offense is geared to the results of a false

report. The thrust of the section is protection of the public against the inconvenience of evacuation and the needless expense of scarce funds.

Section 5-71-211 which overlaps § 5-71-210 to some extent, is aimed more directly at the threat against a particular individual. Section 5-71-211 is broader than prior Arkansas law insofar as it encompasses threats of emergencies other than bombings.

1988 Supplementary Commentary to § 5-71-211

See AMCI 2912, 2912-P.

Original Commentary to § 5-71-212

This section defines the offense of public intoxication. Prior law was of an expansive nature. See prior authority earlier set out at Ark. Stat. Ann. § 48-943 (Repl. 1964). Section 48-943 prohibited not only public drunkenness but also drinking "any intoxicating liquor" in public. The statute set out no requirement that intoxication be coupled with vociferous or offensive conduct. See, *Berry v. City of Springdale*, 238 Ark. 328, 381 S.W.2d 745 (1964). Although the meaning of "public place" was not defined by old § 48-943, the term was broadly construed. See, *Berry, supra*.

Section 5-71-212, as amended by Act 1155 of 1975 (Extended Sess. 1976), reiterates in slightly different language the previous prohibition against drinking in public. It also prohibits appearing in public manifestly intoxicated to a degree that one is likely to endanger himself or the person or property of others. This definition restricts the scope of the offense to those situations where the criminal law should appropriately intervene. As indicated in *Berry*, the purpose of a public drunkenness statute is to prevent annoyance to the public and protect the offender himself. Having adopted language directed to these ends, the Commission thought it inappropriate to go further.

As is the case with old authority, the requirement that the actor be in "public" is satisfied without much difficulty under the new provision. "Public place" is defined at § 5-71-101(1). A "public place" would include a private club, but would not go so far as a recently superseded Texas statute punishing drunkenness "at any private home except [the actor's] own." Vern. Ann. Penal Code, Art. 477, superseded by Vern. Texas Code Ann. § 42.08 (Repl. 1974).

Of course § 5-71-212 is not an endorsement of the notion that imposition of criminal sanctions for public drunkenness is an adequate solution to the multitude of problems associated with the use of alcohol. As pointed out by the Commentary to proposed Texas Code § 42.08, in 1965 one of every three arrests in America was for public intoxication. See, *President's Commission on Law Enforcement and Administration of Justice, Task Force Report; Drunkenness Offenses 1* (1967). Obviously a chronic alcoholic should be treated rather than imprisoned. But until adequate facilities are available, the Commission felt that § 5-71-212 would serve to protect the various interests involved.

Original Commentary to § 5-71-213

Section 5-71-213 prohibits various forms of conduct, all but one having in common the element of lingering or remaining in public places or upon premises of another with an intent to engage in criminal or otherwise offensive, disruptive, or intrusive activity. Some of the conduct here proscribed was the subject of former legislation. See, e.g., prior law formerly found at Ark. Stat. Ann. §§ 41-1125 (Repl. 1964) (loitering near school children); 41-1426 (Repl. 1964) (peeping Tom); 41-4301 (Repl. 1964) (vagrant defined); 41-4303 (Repl. 1964) (vagrancy defined); 41-1433 to -1436 (Repl. 1964) (refusal to leave business establishment after request, etc.). See, also, § 80-1915 (Supp. 1973) (loitering on or near school

grounds). Section 5-71-213 was drafted bearing in mind the admonitions of *Palmer v. City of Euclid*, 402 U.S. 544, 91 S. Ct. 1563, 29 L. Ed. 2d 98 (1971), and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). Cf., Commentary to § 5-71-207. Subsection (2) is intended to be illustrative in nature, providing guidance to law enforcement officers. Subsection (c) directs law enforcement officers to make certain inquiries prior to making an arrest under subsection (a)(1). Lastly, subsection (d) further limits the scope of subsection (a)(1) by providing a defense if the officer does not comply with subsection (c) or if the defendant has a reasonable explanation for his presence and conduct.

1988 Supplementary Commentary to § 5-71-213

In *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855 (1983) the United States Supreme Court held a California statute similar to § 5-71-213 and construed by the California Court of Appeals to require a person detained by a law enforcement officer to provide "credible and reliable" identification unconstitutionally vague on its face under the Due Process Clause of

the Fourteenth Amendment. Because the Arkansas Supreme Court has not authoritatively construed the language of § 5-71-213 and since this language is not identical with that under consideration in *Kolender*, this Supreme Court decision does not appear determinative of the Arkansas statute's constitutionality.

Original Commentary to § 5-71-214

Section 5-71-214 defines the offense of obstructing a highway or public passage. Because no culpable mental state is prescribed, reckless conduct will suffice to establish liability.

Former law on the topic was found in two statutes, one old, one new. The former, old Ark. Stat. Ann. § 41-2101 (Repl. 1964), attached liability to obstructing "any public road by felling any tree or trees across the same. . . ." See, also, former law previously found at Ark. Stat. Ann. §§ 41-2102, 41-2103 (Repl. 1964). The second, Ark. Stat. Ann. § 5-71-226,

formerly codified as § 41-1447 (Supp. 1973), makes it unlawful for groups of two or more persons to engage in certain obstructive activities, including building seizures, on the campuses of "public, private, parochial schools and colleges of this State."

Deference to First Amendment considerations respecting a speaker and his audience suggested the defense supplied by subsection (b). *Cf.*, *Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965).

Original Commentary to § 5-71-215

Section 5-71-215 penalizes conduct calculated to, or likely to result in, outrage to the feelings of the general public or a particular class thereof. The section is of broader scope than was previous law. It is primarily designed to protect sensibilities of affected parties, their property interests being protected by other provisions

such as those in Chapter 71. *Cf.*, *M.P.C.* § 250.9 (desecration of venerated objects).

Earlier law on this subject is limited in scope and permits imposition of quite severe sentences. See, *e.g.*, former Ark. Stat. Ann. §§ 41-3706 (Repl. 1964); 41-1981 to -1986 (Crim. Code 1976); and old 41-4230, 41-4231 (Repl. 1964).

1988 Supplementary Commentary to § 5-71-215

See AMCI 2916.

Original Commentary to § 5-71-216

The need for § 5-71-216 was suggested by organized demonstrations in recent years directed against public institutions and resulting in damage to the buildings which house them. The section is broad enough, however, to encompass any intentional damage to a public structure, regardless of the actor's motivation or

whether he is assisted by others. As such, it proscribes a particular instance of the type of conduct prohibited generally by § 5-38-203 (criminal mischief in the first degree). For prior law, see former authority previously codified as Ark. Stat. Ann. §§ 41-4230, 41-4231 (Repl. 1964).

1988 Supplementary Commentary to § 5-71-216

See AMCI 2917.

Original Commentary to § 5-73-101

The language of subsection (1) defining “instrument of crime” closely parallels M.P.C. § 5.06. The term is easier to explain if examined in the context of § 41-

3102 — possessing instrument of crime. See § 41-3102 and Commentary thereto.

The definition of “minor” is self-explanatory.

Original Commentary to § 5-73-102

This section complements Chapter 3, defining Inchoate Crimes, by providing an additional tool for dealing with incipient criminal activity. Possession of an instrument commonly used for criminal purposes is strongly corroborative of criminal intent and provides a sufficient basis for intervention by law enforcement officers. This section may pick up some conduct that does not constitute an attempt to commit an offense because the defendant’s conduct has not progressed to a stage sufficient to satisfy the “substantial step” requirement of § 5-3-201. See, examples 5 and 6 set out at Comment to § 5-3-201, *supra*.

The fact that an instrument has legitimate uses does not constitute a defense. However, to protect the innocent possessor of articles with a criminal potential, the offense is defined so as to require

the state to prove that the possessor planned to use the instrument for criminal purposes.

Both the Code and preexisting law contain provisions directed at possession of instruments designed to be used in particular object offenses. See, *e.g.*, Code section 5-37-201 (possession of forged instrument); § 5-37-212 (unlawfully using slugs); § 5-37-209 (criminal possession of a forgery device). See, also, Ark. Stat. Ann. § 5-66-104 (keeping gaming device); § 5-66-118 (Crim. Code 1976) (possession of lottery or policy tickets). Although conduct violative of these provisions also constitutes an offense under § 5-73-102 (possessing instrument of crime), § 5-1-110(a)(4) precludes a conviction under both § 5-73-102 and a statute dealing more particularly with possession of an instrument.

1988 Supplementary Commentary to § 5-73-102

See AMCI 3102.

Original Commentary to § 5-73-103

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated irresponsible, incompetent, or dangerous. Persons falling within the categories described in subsection (1) are already prohibited by federal law from purchasing firearms. See, 18 U.S.C.A. § 922(h).

Subsection (b) represents a departure from the general rule announced in § 5-4-311 that the person who successfully completes a period of suspension or probation incurs no civil disabilities. While acknowledging the desirability of allowing such an individual to resume his place in society unburdened by a criminal record, the

Commission perceived no reason why a person who has previously committed an offense serious enough to be classed a felony should ever be able to lawfully possess a firearm.

Act 360 of 1977 made two changes to this section. First, differential grading is introduced by a new subsection (c) permitting felony prosecutions for violations involving prior felony convictions. Otherwise, the offense remains a class A misdemeanor. Second, a new subsection (b)(2) provides that a pardon restoring the ability to possess a firearm removes one from the section’s ambit.

1988 Supplementary Commentary to § 5-73-103

Amendment

Section 5-73-103 was amended by Act 74 of 1987. The introductory language of subsection (a) was added to provide "a mechanism ... whereby persons who constitute no danger to themselves or others should not be restricted for the duration of their lives from owning or possessing firearms" 1987 Ark. Acts 74, § 3. Act 74 also changed "mental defective" to "mentally ill" in subsection (a)(2).

Admissibility of Evidence of Previous Conviction

As a general rule, the jury is not informed of a defendant's prior criminal record before it determines the question of guilt out of concern that this information might influence its deliberations on the question of guilt. *See, for example*, § 5-4-502, which mandates a bifurcated trial when a defendant is charged as a habitual offender. Since the defendant's status as a convicted felon is an essential element of the offense defined in § 5-73-103, the jury not only can, but apparently, must be presented evidence on the defendant's prior criminal record before it retires to consider whether he is guilty of being a felon in possession of a firearm. This creates the possibility that the prosecution will charge a felon who commits an offense using a firearm not only with the other offense but also with being a felon in possession of a firearm in order to get the defendant's prior record before the jury. *See, for example*, *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980), in which a felon who entered a home and committed a robbery using a firearm was convicted of burglary, aggravated robbery, and being a felon in possession of a firearm. *See also*, *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983) (Defendant convicted of aggravated robbery with a firearm and felon in possession of a firearm); *Rubio v. State*, 18 Ark. App. 277, 715 S.W.2d 214 (1986); *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986). The possibility of abuse of § 5-73-103 is enhanced by the Court's decision in *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980). There the defendant argued that the jury need only know that he had committed a felony, and that the specific nature of the crime was irrelevant. The Supreme Court disagreed, stat-

ing that: "[T]he nature of the prior felony and the facts here surrounding the incident leading to the appellant's arrest do reflect on the seriousness of the crime and are relevant in the determination of sentence." 270 Ark. at 500, 606 S.W.2d at 63.

The Court of Appeals has indicated that where a defendant charged as an habitual offender has several previous felony convictions, it is error to permit introduction into evidence of all previous convictions in the guilt phase of the trial. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987). The court reasoned as follows:

The purpose of [the § 5-4-502] bifurcated process is to protect the defendant by withholding proof of his prior convictions until the jury has found him guilty.... In this case, the defendant was not given that protection because evidence of all four of his prior convictions was introduced before the jury could deliberate on the issue of guilt.

...

This protection, however, must be balanced with the State's entitlement to prove all the elements of an offense. In the case at bar, where the appellant was charged with being a felon in possession of a firearm, proof of one prior felony conviction would have been sufficient.... Thus, introduction of all the appellant's prior convictions was unnecessary, and denied the appellant the protection of § 41-1005 [§ 5-4-502].

21 Ark. App. at 242-43, 731 S.W.2d at 230.

Though by its own terms *Tatum* applies only to habitual offender cases, it could logically be held to apply to all § 5-73-103 cases. The prejudice flowing from introduction of multiple convictions is the same whether or not the defendant is charged as an habitual offender.

Even though the defendant may, in effect, compel a stipulation on the previous conviction issue, it does not appear that he gets to choose the least offensive prior conviction. *Clinkscale v. State*, 15 Ark. App. 166, 690 S.W.2d 740 (1985).

What Constitutes Possession

In *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986) appellant was charged under § 5-73-103 after a pistol was found

on the ground beneath the window he was looking out of when the police arrived. The Court of Appeals upheld the conviction, relying upon the definition of "possess" found at § 5-1-102(15).

In *Kandur v. State*, 20 Ark. App. 194, 726 S.W.2d 682 (1987) appellant was convicted of being a felon in possession of a firearm upon evidence that the gun was found in his home, which was occupied by him and his wife. No evidence of actual possession was introduced at trial. The Court of Appeals reversed, holding that "where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband unless there are additional factors linking the appellant with the contraband." 20 Ark. App. at 196, 726 S.W.2d at 682, relying upon *Blair v. State*, 16 Ark. App. 1, 696 S.W.2d 755 (1985).

Constitutionally Infirm Previous Conviction Will Support Conviction Under § 5-73-103

Relying upon *Lewis v. United States*, 445 U.S. 55, 63 L. Ed. 2d 198 (1980), the Arkansas Court of Appeals has held that even a previous felony conviction subject to collateral attack as constitutionally infirm will support a conviction under § 5-73-103. A similar issue has arisen in regard to enhancement under the habitual offender provisions of the Code (§ 5-4-401 *et seq.*) using convictions subsequently reversed on appeal. The Arkansas Supreme Court and the Court of Appeals have consistently declined to modify such sentences on direct appeal, preferring instead to leave appellants to their remedies under A.R.Cr.P. 37. See supplementary commentary to §§ 5-4-502, 504.

See AMCI 3103.

Original Commentary to § 5-73-104

This section is directed at the use, possession, sale, etc., of instruments which have exclusive usefulness as implements of crime. Subsection (a) lists several obvious examples including machine guns, bombs, and silenced firearms, while making it clear that prohibited implements are not limited to the items listed.

Subsection (b)(1) provides a defense if the prohibited weapon was used or possessed in the course and scope of the duties of a law enforcement officer, prison guard, or member of the armed forces.

Subsection (b)(2) is designed to permit a legitimate collector to possess a prohibited weapon, provided he takes steps such as rendering the weapon inoperable to make criminal use unlikely.

Subsection (c) classifies the offense as a

class B felony "if the weapon is a bomb, machine gun, or firearm specially made or specially adapted for silent discharge." Otherwise it is a class D felony. More severe punishment of an offense involving a bomb or machine gun is dictated by the fact that the use of such weapons raises the spectre of extensive injury, both to persons and property. Severe penalties are also justified in a case involving a silenced firearm. Not only is such a weapon totally devoid of any legitimate utility, its possession or use suggests calculated preparation for violent crime, professionalism, and the expectation that the weapon will actually be discharged in the course of a crime rather than used as a means of threat or intimidation.

1988 Supplementary Commentary to § 5-73-104

See AMCI 3104.

Original Commentary to § 5-73-105

This section recognizes the legitimate and authorized use of the instruments covered by § 5-73-104.

Original Commentary to § 5-73-106

The purpose of this provision is to provide some check on traffic in illegal weapons. Defacing a firearm prevents tracing

by the authorities and usually occurs because the firearm is stolen or because it will be used to commit another offense.

1988 Supplementary Commentary to § 5-73-106

See AMCI 3106.

Original Commentary to § 5-73-107

This is a companion offense to that defined in the previous section. Knowing possession of a defaced firearm is evidence that the actor is guilty of possessing stolen property or defacing a firearm or both. The availability of the offense defined by this section should be useful when problems of proof arise with respect to the more serious offenses. The person who innocently acquires a defaced weapon can avoid prosecution by reporting the fact to the police. This enables the police to keep track of defaced weapons and may facilitate the recovery of stolen firearms. The

section does not require the possessor to turn the firearm over to the police and confers no authority to seize the firearm.

The section applies only to serial numbers and identification marks (1) that are required by law *and* (2) that have been removed, defaced, marred, covered, altered, or destroyed. Consequently, antique or homemade weapons which have never been identified by serial number are not within the section's ambit. Compare, 26 U.S.C.A. § 5842 requiring all imported and manufactured firearms to be identified by a serial number.

1988 Supplementary Commentary to § 5-73-107

See AMCI 3107.

Original Commentary to § 5-73-108

Like several other provisions in this chapter, § 5-73-108 proscribes possession with a criminal purpose, thus punishing inchoate criminal activity. By the terms of subsection (a), the offense is complete when "an explosive substance or incendiary device" is sold, possessed, manufactured, or transported by a person who has the purpose of "using that substance or device to commit an offense" (subsection (a)(1)) or who "knows or should know that

some other person intends to use that substance or device to commit an offense" (subsection (a)(2)).

Subsection (b) grades the offense as a class B felony. This grading is justified by the likelihood that criminal use of such substances or devices will have disastrous consequences, since effects of detonation, whether intentional or accidental, are unpredictable and likely to be widespread.

1988 Supplementary Commentary to § 5-73-108

See AMCI 3108.

Original Commentary to § 5-73-109

The provisions of this section, making it an offense to furnish "a firearm or other deadly weapon to a minor," represent new law. The section is designed not only to restrict the availability of tools of crime, but also to prevent the accidental death or injury so often resulting from a child's inability or failure to appreciate the harm-

ful potential of a deadly weapon. Since proper instruction of minors in the use of firearms and other deadly weapons is desirable, the offense is phrased so as to give a parent or guardian a choice as to whether his child may be furnished with a weapon.

1988 Supplementary Commentary to § 5-73-109

See AMCI 3109.

Original Commentary to § 5-73-110

This section, like § 5-73-110, constitutes new law designed to curtail the irresponsible use of deadly weapons.

Subsection (b) provides for disposition of property seized pursuant to the provisions of subsection (a). Considerable latitude is granted both to the courts and to law enforcement personnel in order that corrective measures may be effectively geared to particular fact situations. The law enforcement officer involved may, at his discretion, either return the seized property to the parent or guardian (subsection (b)(1)) or deliver the weapon to the custody of a court under subsection (b)(2). The court may then, in its discretion, either "treat the property as contraband under Chapter 5" (subsection (b)(2)(A)) or issue an order requiring the parent or guardian to "show cause why the seized

property should not be so treated" (subsection (b)(2)(B)).

Under the first course, the property would either be destroyed or, if deemed capable of lawful use, sold at public auction. (See, § 5-5-101(c),(d).) The second course allows the court to hear a parent or guardian before making a decision as to final disposition of the property.

It is felt that this section establishes a reasonable, effective and flexible procedure by which to deal with irresponsible use of weapons and to apprise the appropriate responsible persons of such use. The ultimate sanctions provided, namely, loss of the weapon involved and/or a citation for contempt in the event of failure to respond to the show cause order, are considered both effective and sufficient.

1988 Supplementary Commentary to § 5-73-120

Although this offense was a part of the Arkansas Criminal Code Proposed Official Draft of 1974, it was not included in Act 280 of 1975, which enacted into law the remainder of the Code, due to legislative concern that it broadened the pre-Code offense of carrying a weapon. Following certain amendments, including the exception for weapons carried on a journey and the requirement that the object be carried with a purpose to use it as a weapon against a person, the section was enacted into law as Act 696 of 1975. Some judges and law enforcement officials expressed concern that the purpose requirement would make it more difficult to obtain convictions of the offense than under prior

law. See Comment, *Act 696: Robbing the Hunter or Hunting the Robber*, 29 Ark. L. Rev. 570, 574-76 (1976). In *McGuire v. State*, 265 Ark. 621, 580 S.W.2d 198 (1979), however, the Supreme Court held that there is a presumption that a loaded pistol is placed in a car for use as a weapon. There was a similar judicially created presumption under the pre-Code offense of carrying a weapon. *Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972); *Stephens v. City of Fort Smith*, 227 Ark. 609, 300 S.W.2d 14 (1957). The presumption should apply *a fortiori* when a weapon is carried "about the person" of the defendant.

Subsection (c)(6) was added by Act 813

of 1983, obviously in response to concern that the statute might be applied to persons using pistols to hunt game. Compare the pre-Code case of *Cornwell v. State*, 68 Ark. 447, 60 S.W.2d (1900), in which the court held that carrying a pistol to kill hogs was not a violation of the pre-Code section prohibiting the carrying of a weapon. The amendment may have inadvertently increased the procedural burden of a hunter charged with carrying a hand-

gun. Prior to the change the burden was on the prosecution to show that the person carrying a handgun did so "with a purpose to employ it as a weapon against a person." By denominating subsection (c)(6) a "defense," the change may place the burden on the defendant to introduce evidence supporting his contention that he was hunting game with the handgun. See § 5-1-111(c).

See AMCI 3151 and 3151-D.

UNIFORM CONTROLLED SUBSTANCES ACT

(§ 5-64-101 ET SEQ.)

Prefatory Note

The Uniform Controlled Substances Act is designed to supplant the Uniform Narcotic Drug Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1933, and the Model State Drug Abuse Control Act, relating to depressant, stimulant, and hallucinogenic drugs, promulgated in 1966. With the enactment of the new Federal narcotic and dangerous drug law, the "Comprehensive Drug Abuse Prevention and Control Act of 1970" (Public Law 91-513, short title "Controlled Substances Act"), it is necessary that the States update and revise their narcotic, marihuana, and dangerous drug laws.

This Uniform Act was drafted to achieve uniformity between the laws of the several States and those of the Federal government. It has been designed to complement the new Federal narcotic and dangerous drug legislation and provide an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem.

The exploding drug abuse problem in the past ten years has reached epidemic proportions. No longer is the problem confined to a few major cities or to a particular economic group. Today it encompasses almost every nationality, race, and economic level. It has moved from the major urban areas into the suburban and even rural communities, and has manifested itself in every State in the Union.

Much of this major increase in drug use and abuse is attributable to the increased mobility of our citizens and their affluence. As modern American society becomes increasingly mobile, drugs clandestinely manufactured or illegally diverted from legitimate channels in one part of a State are easily transported for sale to another part of that State or even to another State.

Nowhere is this mobility manifested with greater impact than in the legitimate pharmaceutical industry. The lines of dis-

tribution of the products of this major national industry cross in and out of a State innumerable times during the manufacturing or distribution processes. To assure the continued free movement of controlled substances between States, while at the same time securing such States against drug diversion from legitimate sources, it becomes critical to approach not only the control of illicit and legitimate traffic in these substances at the national and international levels, but also to approach this problem at the State and local level on a uniform basis.

A main objective of this Uniform Act is to create a coordinated and codified system of drug control, similar to that utilized at the Federal level, which classifies all narcotics, marihuana, and dangerous drugs subject to control into five schedules, with each schedule having its own criteria for drug placement.

This classification system will enable the agency charged with implementing it to add, delete, or reschedule substances based on new scientific findings and the abuse potential of the substance.

Another objective of this Act is to establish a closed regulatory system for the legitimate handlers of controlled drugs in order better to prevent illicit drug diversion. This system will require that these individuals register with a designated State agency, maintain records, and make biennial inventories of all controlled drug stocks.

The Act sets out the prohibited activities in detail, but does not prescribe specific fines or sentences, this being left to the discretion of the individual States. It further provides innovative law enforcement tools to improve investigative efforts and provides for interim education and training programs relating to the drug abuse problem.

The Uniform Act updates and improves existing State laws and insures legislative and administrative flexibility to enable the States to cope with both present and

future drug problems. It is recognized that law enforcement may not be the ultimate solution to the drug abuse problem. It is hoped that present research efforts will be continued and vigorously expanded, par-

ticularly as they relate to the development of rehabilitation, treatment, and educational programs for addicts, drug dependent persons, and potential drug abusers.

Comment to Section 201 (A.C.A. § 5-64-201)

The Act vests the authority to administer its provisions in the appropriate person or agency within the State. The "appropriate" person or agency may be one or more persons, or one or more agencies, or a combination. The enacting State should designate that person or agency which has the means to implement, enforce, and regulate the provisions of the Act. For example, authority could be vested in the Office of the Attorney General, a Department of Health, a Division of Public Safety, or such other agency within the State responsible for regulating and enforcing the drug laws. An alternative might be a division of authority whereby one agency might be responsible for controlling drugs under this Article, another agency might be designated to regulate the legitimate industry under Article III, and still another agency might be charged with enforcement. In any event, the ultimate authority for determining the appropriate person or agency is vested in the enacting State.

Section 201 (A.C.A. § 5-64-201) sets out the criteria to be considered for the control and classification of drugs into the several schedules. These criteria consist of the degree of their abuse potential, known effect, harmfulness and level of accepted medical use. All controlled substances are contained in either Schedule I, II, III, IV or V. This classification achieves one of the main objectives of the Uniform Act, which is to create a coordinated, codified system of drug control and regulation.

The Act recognizes that some States have had more stringent laws relating to substances than did the former Federal laws. The Uniform Act follows the Federal Controlled Substances Act and lists all of the controlled substances in five schedules which are identical with the Federal law. The Uniform Act is not intended to prevent a State from adding or removing substances from the schedules, or from reclassifying substances from one schedule to another, provided the procedures

specified in Section 201 (A.C.A. § 5-64-201) are followed.

To bring a substance under control through the administrative procedures, the designated State authority will make findings with respect to the eight criteria, hereinafter enumerated, and issue an order controlling the given substance if it has a potential for abuse. To avoid potential State Constitutional problems, as well as allegations of improper legislative delegation of authority, a procedure has been set out which will require substances controlled by Federal laws to be controlled under the State law after the designated authority is notified and after the expiration of thirty days from the date of publication in the Federal Register of a final order controlling the substance under Federal law. However, the designated authority in the State may object to inclusion of the substance under this Act. It must give public notice of its objections and afford an opportunity for any interested party to be heard on the matter. The designated authority makes a final decision based on that hearing, which is considered final unless specifically acted upon in a contrary manner by the legislature. If the designated authority publicly objects to inclusion of a substance under the controls of this Act, control is automatically stayed pending the outcome of the hearing and the designated authority's final decision. Once a final decision is rendered controlling the substance, the stay automatically terminates and the substance is deemed controlled under this Act.

The eight criteria to be considered with regard to a substance are as follows:

(1) Its actual or relative potential for abuse —

These are the criteria which will be used most often to control drugs and will provide the basis for the greatest controversy. The term "potential for abuse" is found in the definition of a "depressant or stimulant drug" in the Drug Control

Amendments of 1965 (21 U.S.C. 201(v)) and is characterized further in the regulations (21 CFR 166.2(e)) promulgated under those regulations as follows:

"The Director of the Bureau of Narcotics and Dangerous Drugs may determine that a substance has a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect if:

(1) There is evidence that individuals are taking the drug or drugs containing such a substance in amounts sufficient to create a hazard to their health or to the safety of other individuals or of the community; or

(2) There is significant diversion of the drug or drugs containing such a substance from legitimate drug channels; or

(3) Individuals are taking the drug or drugs containing such a substance on their own initiative rather than on the basis of medical advice from a practitioner licensed by law to administer such drugs in the course of his professional practice; or

(4) The drug or drugs containing such a substance are new drugs so related in their action to a drug or drugs already listed as having a potential for abuse to make it likely that the drug will have the same potentiality for abuse as such drugs, thus making it reasonable to assume that there may be significant diversions from legitimate channels, significant use contrary to or without medical advice, or that it has a substantial capability of creating hazards to the health of the user or to the safety of the community."

These regulations follow and extend the suggestions contained in House Report No. 130, 89th Congress, First Session, page 7 (1965).

The report went further in its discussion of the "potential" aspect of the term. It stated that it did not intend that potential for abuse be determined on the basis of "isolated or occasional non-therapeutic purposes." The House Interstate and Foreign Commerce Committee felt that there must exist "a substantial potential for the occurrence of significant diversions from legitimate channels, significant use by individuals contrary to professional advice, or substantial capability of creating haz-

ards to the health of the user or the safety of the community." (at page 7)

There are two points that should be emphasized in this definition. First, the House Committee was speaking of "potential" rather than "actual" abuse. In considering a drug for control, it would not be necessary to show that abuse presently exists but only that there are indications of a potential for abuse.

This is borne out by the Committee's statement that "the Secretary of Health, Education, and Welfare should not be required to wait until a number of lives have been destroyed or substantial problems have already arisen before designating a drug as subject to controls of the bill." (at page 7) Thus, the incidence of present abuse is not the test which must be applied. The test is a determination of future or potential abuse. The second point of emphasis is that in speaking of "substantial" potential the term "substantial" means more than a mere scintilla of isolated abuse, but less than a preponderance. Therefore, documentation that, say, several hundred thousand dosage units of a drug have been diverted would be "substantial" evidence of abuse despite the fact that tens of millions of dosage units of that drug are legitimately used in the same time period. The normal way in which such diversion is shown is by accountability audits of the legitimate sources of distribution, such as manufacturers, wholesalers, pharmacies and doctors.

Misuse of a drug in suicides and attempted suicides, as well as injuries resulting from unsupervised use also would be regarded as indicative of a drug's potential for abuse.

(2) Scientific evidence of its pharmacological effects —

The state of knowledge with respect to the uses of a specific drug are, of course, major considerations, e.g., it is vital to know whether or not a drug has an hallucinogenic effect if it is to be controlled because of that effect.

(3) The statement of current scientific knowledge regarding the substance —

Criteria (2) and (3) are closely related. However, (2) is primarily interested in pharmacological effects and (3) deals with all scientific knowledge with respect to the substance.

(4) Its history and current pattern of abuse —

To determine whether or not a drug should be controlled, the designated State authority must know the pattern of abuse of that substance, including the social, economic and ecological characteristics of the segments of the population involved in such abuse.

(5) The scope, duration, and significance of abuse —

Not only must the designated State authority know the pattern of abuse, but it must know whether abuse is widespread. It must also know whether it is a passing fad, like smoking banana peels, or whether it is a significant chronic abuse problem like heroin addiction. In reaching this decision, the State authority should consider the economics of regulation and enforcement attendant to such a decision. In addition, it should be aware of the social significance and impact of such a decision upon those people, especially the young, that would be affected by it.

(6) What, if any, risk there is to the public health —

The designated State authority must have the best available knowledge of the pharmacological properties of any drug under consideration. If a drug creates no

danger to the public health, it would be inappropriate to control the drug under this Act.

(7) Its psychic or physiological dependence liability —

There must be an assessment of the extent to which a drug is physically addictive or psychologically habit forming, if such information is known.

(8) Whether the substance is an immediate precursor of a substance already controlled —

This criterion allows the inclusion of immediate precursors on this basis alone into the appropriate schedule and thus safeguards against possibilities of clandestine manufacture.

The overall intent of this Section is to create reasonable flexibility within the Uniform Act so that, as new substances are discovered or found to have an abuse potential, they can speedily be brought under control without constant resort to the legislature. Such flexibility will allow the laws to keep in step with new trends in drug abuse and new scientific information. States should consider establishing a Scientific Advisory Committee consisting of leading medical and pharmaceutical professionals to advise the appropriate person or agency on control of substances.

Comment to Section 203 (A.C.A. § 5-64-203)

Based upon these criteria, hallucinogenic substances and certain narcotic substances are included in the same schedule (Section 204*). This is primarily because both groups of drugs have no accepted use in the United States and both have a high potential for abuse. However, hallucinogenic substances in Schedule I are not treated in the same manner for penalty purposes as narcotic substances. (See Prohibited Acts A, Section 401 (A.C.A. § 5-64-401).)

Experimental substances found to have a potential for abuse in early testing will also be included in Schedule I. When those substances are accepted by the Federal Food and Drug Administration as being safe and effective, they will then be considered to have an accepted medical use for treatment in the United States, and

thus, will be eligible to be shifted to an appropriate schedule based upon the criteria set out in Sections 205 (A.C.A. § 5-64-205), 207 (A.C.A. § 5-64-207), 209 (A.C.A. § 5-64-209), and 211 (A.C.A. § 5-64-211).

*This section lists the controlled substances included in Schedule I. It was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and published annually by the Director of the Arkansas Department of Health or his authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

Comment to Section 206*

Schedule II now includes only those substances principally considered as Class "A" narcotic drugs, i.e., narcotics dispensed only upon written prescription. It is contemplated that if stringent control of a nonnarcotic substance is required, the substance could be administratively added to Schedule II based upon the criteria set out in Section 205 (A.C.A. § 5-64-205).

stances included in Schedule II. It was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and published annually by the Director of the Arkansas Department of Health or his authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

*This section lists the controlled sub-

Comment to Section 208*

Schedule III includes two categories of drugs — those narcotic drugs formerly considered Class "B" narcotics, and stimulant and depressant drugs formerly included under both the Model State Drug Abuse Control Act and the Federal Drug Abuse Control Amendments of 1965.

Subsection (e), which includes the former Class "B" narcotic drugs, reflects two changes. First, all calculations have been shifted from the historic apothecary system of measurement to the metric system to bring them in line with the general movement by many scientific groups and industries, including the pharmaceutical industry, to the metric system. Second, all dosage-strength calculations have been adjusted to correspond to the more mod-

ern 5 cc. teaspoon as a unit dose rather than the historic 3.69 cc. teaspoon size, upon which all previous calculations were made.

*This section lists the controlled substances included in Schedule III. It was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and published annually by the Director of the Arkansas Department of Health or his authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

Comment to Section 210*

Schedule IV contains certain tranquilizing drugs and long-acting barbiturates. All substances contained in the schedule must be dispensed on prescription.

*This section lists the controlled substances included in Schedule IV. It was originally adopted in Arkansas but was

subsequently repealed and is now governed by administrative regulation. It is revised and published annually by the Director of the Arkansas Department of Health or his authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

Comment to Section 212*

While it is contemplated that Schedule V drugs will be sold on a restricted over-the-counter sale basis for a valid medical purpose, this Section is not intended to supersede prescription requirements in those States where such substances can-

not be sold except on a prescription-only status.

While this Schedule only contains narcotic drugs formerly considered as Class "X" (exempt over-the-counter drugs), the criteria set out in Section 211 are broad

enough to include over-the-counter preparations which meet those criteria and are in need of some limited form of control.

The comments to Section 208(e) relating to the metric system and the dosage strength calculations apply equally as well to Schedule V.

*This section lists the controlled sub-

stances included in Schedule V. It was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and published annually by the Director of the Arkansas Department of Health or his authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Department of Health.

Comment to Section 301*

This Section will permit a State to cover the costs of actual registration and control by charging reasonable fees. However, the Section does not permit a State to charge exorbitant fees as a means of fully implementing the regulatory provisions of the Act and thereby avoiding the need for additional State appropriations.

*This section was not adopted in Arkansas. Sections 301-306 related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

Comment to Section 302*

This Section requires any person who engages in, or intends to engage in, the manufacture, distribution, or dispensing of controlled substances to be registered by the State. Practitioners who administer, as that term is defined in Section 101(b) (A.C.A. § 5-64-101(b)), or who prescribe, will be required to register; however, under subsequent sections they may be exempt from the record-keeping requirements. By registering every individual dealing with controlled substances, the State will know who is responsible for a substance and who is dealing in these substances. The tighter registration requirements imposed by this Section are designed to close the gaps in State laws and thus eliminate many of these sources of diversion, both actual and potential.

Common and contract carriers, ware-

housemen, ultimate users, and agents of registrants are specifically exempted from the registration requirements since to require otherwise would be extremely burdensome and afford little increase in protection against diversion.

Annual registration is called for so that a licensee can be screened and the registration lists purified should the need arise. In addition, the annual registration requirement will be a form of check on persons authorized to deal in controlled substances.

*This section was not adopted in Arkansas. Sections 301-306 related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

Comment to Section 303*

This Section sets out the criteria under which a State authority registers persons to engage in the various activities concerning controlled substances. There is required a showing by the applicant of the maintenance of adequate safeguards against diversion, of compliance with State and local laws, and of his previous experience in the manufacture or distribution of such substances. These criteria are

almost identical to those which the Attorney General must consider in registering an applicant under the Federal Controlled Substances Act except for antitrust considerations, which were not considered applicable to the State control procedures. Thus, any particular applicant need meet only one set of criteria for both Federal and State registration.

In addition, registration under the Fed-

eral Controlled Substances Act will be deemed sufficient for registration under State law. Since the criteria for Federal and State registration are virtually identical, nothing would be served by requiring a registrant under Federal law to go through a similar procedure in registering under State law. Wasteful duplication would be the only result. Under the proposed system, a single form will suffice to register an applicant under both State and Federal law.

Practitioners are to be registered to prescribe or dispense substances in Schedules II through V, comprising all substances with recognized medical uses, if they are authorized to prescribe or dispense under the laws of the State. If those practitioners wish to conduct research in nonnarcotic substances in Schedules II through V, the State authority has within

its discretion the right to require, or not require, a separate registration. It is felt that such permissive language will be most beneficial to those States who wish to keep close tabs on all those individuals who conduct research within their borders.

Practitioners who are registered under Federal law to conduct research with respect to Schedule I substances are permitted to conduct that research in a State solely upon notification to the appropriate State authority of a valid Federal registration.

*This section was not adopted in Arkansas. Sections 301-306 related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

Comment to Section 304*

This Section sets out the grounds upon which a State authority may revoke or suspend a registration. Subsection (a) sets out the criteria upon which a registration can be revoked or suspended during the year in which that particular registration is in force. In denial of registration renewal situations for manufacturers or distributors, the criteria in this subsection should not be used. Instead, the State authority should apply the broader criteria set out in Section 303(a) relating to initial registration.

Subsection (b) allows the State authority in its discretion to limit the revocation or suspension of a registration to a particular substance rather than revoking or suspending the whole registration. This will be especially effective where, for example, a manufacturer committed a criminal violation, but certain mitigating circumstances militate against removing his full registration. Instead, his right to manufacture a particular substance could be suspended or revoked. This would put him out of the business of manufacturing in the substance or schedule in which he committed the violation, but would not totally remove his livelihood.

Subsection (c) relates to forfeitures of controlled substances where the registrant who has the right to possess those substances has his registration revoked. This Section has purposely been drafted to be permissive rather than mandatory. Thus, for example, if the registration of a sole medical practitioner or a community pharmacy in a small town were revoked, the State authority could in its discretion allow the revoked registrant to sell those substances to a new owner-registrant so that the inhabitants of the particular town would not have to go without needed pharmaceutical supplies.

Upon a final order of revocation of a registration, the State must promptly notify the Federal Bureau of Narcotics and Dangerous Drugs. Such a provision is necessary since revocation of a State registration is grounds for denial, suspension, or revocation of a Federal registration.

*This section was not adopted in Arkansas. Sections 301-306 related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

Comment to Section 305*

This Section requires the State authority to serve upon a registrant an order to show cause why his registration should not be revoked or suspended or his registration renewal refused prior to taking such action. The order will contain enough information to fully apprise the registrant of the charges against him and will be served at least thirty days before his current registration expires. All proceedings will be conducted under appropriate administrative procedures. If, during the pendency of an administrative hearing to deny a renewal registration, the registration runs out, this Section keeps the old registration in force until the administrative hearing is completed.

Subsection (b) allows the State authority, in cases of imminent danger to the public health or safety, to suspend the registration simultaneously with the institution of proceedings to revoke, sus-

pend, or refuse a renewal. Such an emergency situation can occur when, for example, a practitioner, knowing that action is being taken to revoke his registration, begins to buy and divert large quantities of controlled substances. Rather than having to wait until all administrative proceedings have been completed and allow substantial diversion of these substances, the State authority may act immediately to suspend the registration. It may then place all controlled substances under seal until the administrative hearing is completed.

*This section was not adopted in Arkansas. Sections 301-306 related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

Comment to Section 306*

This Section, which requires registrants to prepare inventories and records of all stocks of Schedule I through V substances, ties into the proposed Federal system and should prove to be more than adequate for State recordkeeping purposes. By tying the State and Federal systems together, different "paper" requirements will be avoided and wasteful duplication eliminated. However, if a State sees a need for any additional recordkeeping or inventory requirements, this provision provides the appropriate

State agency with the authority to promulgate those rules.

This Section is also intended to exempt those individuals exempted by Federal law from recordkeeping and inventory requirements.

*This section was not adopted in Arkansas. Sections 301-306 related to registration of persons who manufacture, distribute, or dispense controlled substances within the state.

Comment to Section 307 (A.C.A. § 5-64-307)

This Section requires order forms for the distribution of any Schedule I or II substances. It, too, is tied into the proposed Federal system and compliance with the Federal order form requirements

should be sufficient to fulfill any State order form requirements. Thus, economic waste resulting from duplication will again be avoided.

Comment to Section 308 (A.C.A. § 5-64-308)

This Section draws on existing State and Federal law with the exception that emergency provisions have been added with regard to the filling of oral prescrip-

tions. This was done in recognition of common accepted practice between physicians and pharmacists.

Comment to Section 401 (A.C.A. § 5-64-401)

This Section designates the prohibited acts relating to unlawful manufacture and delivering of controlled substances, or possession with intent to manufacture or deliver such substances. The penalty structure is broken down according to the schedule of the substance involved and the particular unlawful act, since it is felt that trafficking offenses involving certain types of drugs constitute a greater danger to the public and are deserving of stiffer penalties. The actual sentence length for any particular offense has not been included since it is felt that such a designation is purely a State decision.

The term "delivery" as used in this Section is intended to include both dispensing and distribution as they are defined in Section 101 (A.C.A. § 5-64-101).

Subsection (c) (A.C.A. § 5-64-401(c)) has been drafted specifically to provide for

a lesser penalty for simple possession than is provided for the trafficking and illicit manufacturing type offenses under subsections (a) (A.C.A. § 5-64-401(a)) and (b) (A.C.A. § 5-64-401(b)). It is contemplated that subsections (a) (A.C.A. § 5-64-401(a)) and (b) (A.C.A. § 5-64-401(b)) will contain harsh penalties (felony, high misdemeanor, etc.); subsection (c) (A.C.A. § 5-64-401(c)) provides for misdemeanor (or comparable State term) treatment for the simple possession charge.

Finally, it should be noted that lawful possession of a Schedule V substance by ultimate users is not an offense. [See Section 302(c)(3)*].

*This subdivision was not adopted in Arkansas.

Comment to Section 402 (A.C.A. § 5-64-402)*

This Section (A.C.A. § 5-64-402) defines those "commercial" offenses relating to registrants or other persons who unlawfully manufacture, distribute, or dispense controlled substances or fail to comply with the requirements of the Act.

Violation of subsection (a)(4) (A.C.A. § 5-64-402(a)(2)) occurs when an inspector has an administrative inspection warrant, or is not required to have such a warrant under Section 502(b)(4) (A.C.A. § 5-64-502(b)(4)), and the person whose premises are to be inspected refuses admittance.

Subsection (a)(5) (A.C.A. § 5-64-402(a)(3)) applies to all persons who knowingly keep or maintain any illegal establishment. Illegal establishments under this Section are intended to include not only stationary buildings, such as stores, shops, warehouses or dwellings and movable vehicles, such as boats or aircraft, but also intermediate structures such as trailers.

*Arkansas had not enacted subdivisions (a)(1) and (a)(2) of this Section.

Comment to Section 403 (A.C.A. § 5-64-403)

This Section sets out the fraud offenses relating to the manufacture and distribution of controlled substances. This area of criminal activity was segregated from Section 401 (A.C.A. § 5-64-401) because of the nature of these offenses and their effect, regardless of the drug involved, on the integrity of the regulatory system.

It should be noted that the acts or

omissions set forth in subsection (a)(4) are not only a violation of this Act but also provide a basis for revocation or suspension of registration under Section 304*.

*This section was not adopted in Arkansas.

Comment to Section 406 (A.C.A. § 5-64-406)

This Section is designed to impose stiffer penalties on those persons over eighteen years of age who distribute controlled substances to persons under eighteen years of age. However, the recipient must be at least three years younger than the distributor before this Section comes into effect. The three year age differentiation is included to prevent imposition of

the stiffer penalties in a case such as where a nineteen year old college student distributes two or three marihuana cigarettes to his seventeen year old roommate. In this situation, there is not the element of seduction so often found in the cases where the distributor and recipient are far apart in age.

Comment to Section 407 (A.C.A. § 5-64-407)

This Section is designed to permit a judge to place a first offender on probation in lieu of sentencing him to prison. However, it is applicable only to cases involving simple possession of controlled substances and is available only once with respect to any person. It should also be noted that first offender treatment is not available as a matter of right, but rather is discretionary with the judge.

An additional aspect of this Section is that it provides for confidentiality of the defendant's record upon fulfilling all the terms and conditions of his probation. This will preclude any permanent criminal record from attaching to and following the individual in later life.

This Section, which goes beyond the provisions of the Youth Corrections Act by

allowing for first offender treatment regardless of the defendant's age, should give judges added flexibility in dealing with this type of offender. This is particularly so in light of the fact that most of these individuals are either casual drug users or experimenters who would be unlikely to commit the offense again after their first encounter with the law.

This Section is bracketed so that States which have a general statutory provision allowing conditional discharge for first offenders need not use this Section. However, if that State provision does not cover simple possession of a controlled substance, and in all other States which have no first offender treatment, this Section should be included.

Comment to Section 408 (A.C.A. § 5-64-408)

This Section is bracketed so that it may be used in States which choose to impose stiffer penalties on those persons who commit second and subsequent offenses

under the Act. This stiffer second penalty provision, however, will not apply to offenses of simple possession under Section 401(c) (A.C.A. § 5-64-401(c)).

Comment to Section 501 (A.C.A. § 5-64-501)

The purpose of this Section is to insure that those individuals charged with the enforcement of this Act may be given full enforcement authority. Full enforcement authority, as opposed to authority restricted to offenses relating only to controlled substances, should give additional flexibility in the utilization of enforcement personnel within the State.

This Section does not give blanket authority to all members of a particular agency to carry weapons, execute and serve search warrants, make arrests, make seizures or perform other law enforcement duties. It does place discretion in the appropriate person or agency to select those field enforcement personnel who will enforce the act.

Comment to Section 502 (A.C.A. § 5-64-502)

The purpose of this Section is to codify certain recent United States Supreme Court decisions, in particular *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967), and *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970), with regard to inspection warrants.* The Section sets out in very careful terms the procedures and restrictions for obtaining and using an administrative inspection warrant. This is of vital importance to the States since they are involved in the regulation of the legitimate drug industry and must have the ability to inspect records, books and premises if access to them is denied. By having a carefully delineated code section dealing with administrative inspection warrants, law enforcement officers will be more certain of what is needed to obtain them and the courts can apply a uniform standard. Perhaps even more important, the industry being inspected will have more certainty as to its rights and obligations in this area.

*See also: *Kramer Grocery v. U.S.*, 294 F.Supp. 65 (1968); and *United States v. Stanack Sales Co.*, 387 F.2d 849 (1968).

It should be noted that the Supreme Court, in *Camara v. Municipal Court* spoke of the requirement of "probable cause" for issuance of an administrative inspection warrant. But the Court was not, however, speaking in terms of criminal probable cause, which would require a specific knowledge of the condition of the building to be inspected. Instead, rejecting the criminal probable cause argument, it required merely a valid public interest in the effective enforcement of a particular public health or safety act which justified the intrusion contemplated.

Although this Section codifies the Court's view for administrative inspection warrants, it in no way affects criminal probable cause as that phrase is defined under present criminal statutes or case law.

Finally, it should be noted that while Section 402(a)(4)** makes it a violation of the Act to refuse entry into any premises for inspection, it is contemplated that such inspection will have been authorized under the rules set out in this Section.

**This subdivision was not adopted in Arkansas.

Comment to Section 504 (A.C.A. § 5-64-504)

The purpose of this Section is to establish a basis for increased cooperation and exchange of information among State, local, and Federal law enforcement agencies. Real implementation of these cooperative arrangements will provide for the first time a means of obtaining meaningful statistics on drug dependent persons and other controlled substance law offenders. There is a definite need to obtain

these statistics if there is ever to be an accurate assessment of the total drug abuse problem in the United States. The intent of this section is to insure that both Federal and State agencies responsible for enforcement of these laws work in harmony and maximize their direction and efforts, rather than duplicate and overlap each other's activities.

Comment to Section 505 (A.C.A. § 5-64-505)

This Section is designed to provide forfeiture provisions for those States which do not already have them and to revise those State forfeiture laws which have become obsolete and unenforceable over the years. Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities

used by drug traffickers in committing violations under this Act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility.

Until recently, the Federal Government

adopted a policy of seizing vehicles belonging to defendants being prosecuted in State proceedings. The primary reason for this was that the States either had no forfeiture provisions or else they did not enforce them. However, this policy had to be discontinued, and, as a result, numer-

ous vehicles which would be subject to forfeiture are no longer being confiscated. With comprehensive and effective forfeiture provisions, States may be less reluctant to implement them and begin confiscating the tools of the drug trafficker.

Comment to Section 507 (A.C.A. § 5-64-507)

States which have adopted the Model State Administrative Procedures Act may wish to modify the language of this Sec-

tion to conform to it or omit the Section entirely.

Comment to Section 508 (A.C.A. § 5-64-508)

This Section, setting out the education and research provisions, is designed to make it clear that education and research are an integral part of the total law enforcement effort. Broad language is used in order to provide maximum latitude.

Of primary importance are subsections (c) (A.C.A. § 5-64-508(c)) and (d) (A.C.A. § 5-64-508(d)) authorizing persons engaged in legitimate research to withhold the identities of research subjects and allowing the State to authorize possession and distribution of controlled substances. These provisions will tie into proposed Federal law and will allow legitimate re-

searchers to carry on much needed research without fear of exposing either themselves or their research subjects to criminal prosecution.

It should be noted that a grant of Federal immunity would preempt any State grant or denial of immunity. However, the converse would not be true, and a researcher in possession of controlled substances under a State grant of immunity could be prosecuted under Federal law if the Federal government elected not to confer immunity. However, it is unlikely that this situation will arise.

Comment to Section 601 (A.C.A. § 5-64-601)

Subsection (d)* is a provisional grandfather clause which provides for the automatic licensing of any person already licensed or registered by the State to engage in the manufacture, distribution, or dispensing of controlled substances on the Act's effective date. After that date, they will then be subject to the annual renewal requirements and will have to

meet all the requirements of Sections 302** and 303**.

*This subdivision was not adopted in Arkansas.

**These sections were not adopted in Arkansas.

Comment to Section 605 (A.C.A. § 5-64-605)

This Section is included for States which have no general saving statute. If a State has such a statute, with a compara-

ble severability clause, Section 605 (A.C.A. § 5-64-605) should be excluded.

UNIFORM MACHINE GUN ACT

(§ 5-73-201 ET SEQ.)

Prefatory Note

A special committee on a "Uniform Act to Regulate the Sale and Possession of Firearms" was appointed at the Minneapolis meeting of the National Conference of Commissioners on Uniform State Laws in 1932. The subject having been brought to the attention of the Conference by the United States Revolver Association, it was quite natural that in its initial effort the committee submitted an act, finally approved in 1930 at Chicago, dealing solely with firearms of the revolver, pistol, or sawed-off shotgun type, which might readily be concealed.

But during the interim prior to approval of that act, the infant industry of racketeering grew to monstrous size, and with it the automatic pistol replaced the revolver, to be in turn displaced by a partly concealable type of machine gun—the Thompson .45 inch caliber submachine gun becoming most popular, equipped with either 100 or 50 shot drum magazine, or 20 shot clip magazine, using the ordinary .45 Colt automatic pistol cartridge.

In the 1930 report, it was stated the committee believed unanimously that the Firearms Act should be confined entirely to guns of the pistol type; reference to machine guns and other offensive weapons was therefore eliminated from previous tentative drafts, and the drafting of a separate act to cover the machine gun was recommended. In 1931, the committee presented a supplementary report, submitting a first tentative draft of such an act. This draft was largely based upon the Pennsylvania Act of 1929. At the 1932 meeting of the National Conference at Washington, D.C., the committee filed a second tentative draft, fully annotated. That the subject was considered of grave importance by state legislatures was evidenced by the fact that it had already merited action in sixteen states and the District of Columbia. Following a thorough study of the subject the Conference thereupon put the act in final form and approved it, and the act was subsequently

approved by the American Bar Association. The act is intended not only to curb the use of the machine gun, but to make it unwise for any civilian to possess one of the objectionable type.

The act defines a machine gun so that it will exclude automatic or semiautomatic sporting rifles or shotguns.

A "crime of violence" is defined as in the Uniform Firearms Act, excepting that kidnapping is added.

Possession or use of a machine gun of any kind in the perpetration or attempted perpetration of a crime of violence, is declared to be a crime; following the similar provision in the Uniform Firearms Act. In this connection it may be proper to again call attention to experience in England, where it is still quite unusual to find crimes of violence committed by persons who are armed, undoubtedly because in that country a person found guilty of committing a crime of violence when armed receives, by a mandatory provision of the law, an additional sentence.

It is believed that this act has "teeth" enough in it to make it possible for the police departments throughout the nation to meet the challenge of the gangsters and racketeers who have been adopting the machine gun in criminal warfare. Particular attention is called to the fact that this act gives great aid to the police in enforcing it by reason of the presumptions which are made part of this proposed law. Heretofore, the police have been helpless in many instances, because it was legal to possess a machine gun. Under the provisions of this act, however, the mere possession of a machine gun is presumed to be for offensive and aggressive purposes, except as provided in the act, and the exceptions are very limited.

Possession or use of a machine gun of any kind for offensive or aggressive purpose is likewise declared to be a crime; and its possession or use for such purpose is presumed if the gun is found on premises not owned or rented for legitimate

use by the possessor or user of the gun or if the gun is in the possession of, or used by, either an unnaturalized foreigner, or a person previously convicted of a crime of violence.

Possession for offensive or aggressive purpose is also presumed if the machine gun is of the kind most commonly used by criminals and has not been registered, or if shells adapted to use in that particular weapon are found in the immediate vicinity. As stated above, the Thompson submachine gun, with wooden butt-stock removed, using ordinary .45 caliber Colt automatic pistol shells, is now used almost exclusively by criminals in the United States. Although these cartridges have a limited range, the bullets have satisfactory "stopping" effect at short range, and therefore answer the purpose of the gangster, besides being easily purchased, at any hardware or sporting goods store, without arousing suspicion. It was at first intended to make the presumption apply only to .45 caliber guns and cartridges; but lest criminals evade the law by using a smaller caliber the act now specifies any pistol shell of a caliber larger than .30 inch, or its metric equivalent of 7.63 millimeters. Few, if any, pistol cartridges are on the market exceeding .45 caliber, and no pistol cartridge of less than .30 caliber is made with sufficient range and stopping power to answer the purpose of the gangster.

To overcome any danger of a presumption arising against one who has legitimate use for a machine gun, such person

need only either avoid the use of ordinary pistol shells, or else use a type of gun not readily transportable or concealable. There are many such on the market, more effective for defensive purpose than the Thompson submachine gun.

The presumption contained in Section 5 (A.C.A. § 5-73-206) is often found vital to successful prosecution of criminals.

The act requires manufacturers to keep a register of all machine guns handled, but only for purpose of inspection by police officers. On the other hand, all machine guns of the prohibited type (adapted to use pistol cartridges of .30 or larger caliber) must be registered in the office of the secretary of state, or other state official. Any failure to register raises the presumption of possession for offensive or aggressive purpose. The act further permits, in Section 9 (A.C.A. § 5-73-210), search for, and seizure of, machine guns of the prohibited type.

If speedily adopted in a sufficient number of states, the act will doubtless have a very beneficent effect, particularly through its registration requirements.

It was necessary to make this act supplementary to the Uniform Firearms Act because of the technical difference in describing firearms, as distinguished from the machine gun, and it will help the administration of the law as to the use of firearms to have this act separate and distinct, or at least supplementary to whatever laws may already have been enacted with reference to firearms.

TITLE 9
FAMILY LAW
UNIFORM ADOPTION ACT
1969 REVISED ACT
(§ 9-9-201 ET SEQ.)

Commissioners' Prefatory Note

The Problem: Since the first Uniform Adoption Act was promulgated in 1953, experience has shown that the original Act of the National Conference and many other models and enacted laws are defective in several respects. Many acts, as an example, require the consent of certain designated natural parents of the child to be adopted but contain no procedure whereby independently or as a part of an adoption proceeding, the right of a parent to consent or withhold consent to adoption could be terminated. While many juvenile court acts contain provisions for terminating parental rights, many of these acts by concentrating on the fault of a particular type of parent are inadequate where the objective is termination of the parental right to control adoption.

A second defect in many adoption acts is the lack of a full list of persons eligible to adopt a child. By emphasizing adoption by husband and wife together, many acts did not provide for adoption by a person who, for some reason, is not joined by the other spouse. For example, in a marriage in which the spouses are legally separated, neither spouse can, in many states, adopt a child without the consent of the person with whom the adopting parent no longer has any relations.

Another problem under existing adoption laws concerns the effect of a petition for adoption and of the adoption decree on the parent-child relationship. It is not clear, for example, whether a person who has pending an adoption application is the proper party plaintiff for damages in a tort injury to the minor child. Many states permit the adopted child to continue as a member of the family of his blood relatives which is thought to be contrary to the welfare of the child and, moreover, invita-

tion is made to legal and illegal attacks upon the secrecy of the adoption proceedings.

What the Proposed Act Does: This Act permits any individual whether an adult or a minor to be adopted although it provides a different requirement of consent to adoption and of social investigation where the person to be adopted is below a certain age. Section 3 (A.C.A. § 9-9-204) lists the persons who may adopt a child. Sections 5 (A.C.A. § 9-9-206), 6 (A.C.A. § 9-9-207) and 19 (A.C.A. § 9-9-220) indicate the persons who must consent to an adoption. In section 6 (A.C.A. § 9-9-207) consent of a natural parent is dispensed with in certain circumstances such as abandonment or failure to communicate with or support the child. Section 19 (A.C.A. § 9-9-220) provides a procedure for terminating a parent-child relationship. While normally this proceeding will be conducted independently of the adoption proceeding, this Act relies on the discretion of the judge to determine whether the termination proceeding may be combined with an adoption proceeding.

Several sections attempt to deal with so-called black market operations in children. While the Act does not prohibit private placement of children, it attempts to discourage black market adoptions and private placements. Section 10 (A.C.A. § 9-9-211) requires a report by the adopting parent of all expenditures made on his behalf in connection with an adoption. An investigation of the home of the adopting parents is not required after the petition is filed if a child placement agency joins in the petition for adoption. A petition for adoption may not be granted until six months after a designated state agency

has been informed of custody of the child by petitioner except in an agency placement where adoption may be granted in six months after the petitioner acquires custody of the child.

Section 13 (A.C.A. § 9-9-214) states the standard the court is to apply in determining whether to grant the petition for adoption. The standard is the best interest of the child. The welfare department, in making its investigation is required to make recommendations on this matter, but the court is required only to take the

recommendations into account but not to follow the recommendation.

The Act specifies in section 14 (A.C.A. § 9-9-215) the effect of an adoption decree. Basically the Act provides that on adoption the child becomes a stranger to his natural parents and their families and becomes a child of the adopting parents and their families. All laws, statutes and documents are to be governed by this statutory definition of "child" unless a clear contrary intent is exhibited.

Commissioners' Note to Section 1 (A.C.A. § 9-9-202)

"Child" is defined so as to include both an adult and a minor as a child capable of being adopted. If an adult is adopted, he becomes a "child" of the adoptive parents to the same extent that a natural child is a "child" of his natural parents even though he is an adult.

The definition of "minor" is the more important definition of this Act. The original Uniform Adoption Act accepted the then general definition of minority. It is well known that many variations have developed in state law as to the age attached to minority in relation to particular purposes. The voting age, the drinking age, the age of consent, and the like now vary considerably in the states. The pamphlet "Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children" prepared by the Children's Bureau of the United States Department of Health, Education and Welfare in 1957 and again in

1961 used as the age for a "minor" the age of 18 whether a male or female. The two matters as to which the definition is important in this Act are the age of the adopted person for whom the natural parents must consent to his adoption and the age of a parent who may consent to the adoption of his own child. When the question is whether the child to be adopted must also consent, a different age is proposed in this Act. See section 10 (A.C.A. § 9-9-211).

The definition of "person" is taken from the Uniform Statutory Construction Act and is broad enough to include both a public social welfare agency or an independent social welfare agency. It is also broad enough to include a natural person acting to place children for adoption, but such a person may act as a placing agency only if he is "certified, licensed or otherwise empowered to place children for adoption."

Commissioners' Note to Section 2 (A.C.A. § 9-9-203)

This section is intended to permit the combination in one act of provisions for adoption of minors and provisions for the adoption of adults. Either a minor or an

adult may be adopted. This Act provides, in certain places, for a different procedure when an adult is adopted from that provided when a minor is adopted.

Commissioners' Note to Section 3 (A.C.A. § 9-9-204)

This section clarifies the list of persons entitled to adopt a child. In subsection (1) (A.C.A. § 9-9-204(1)) a husband and wife acting together are entitled to adopt even though one or both of them is a "minor," that is, under the age of contracting as provided in this act or in general law. The Act lists several cases where a married

person may adopt a child without the other spouse joining as petitioner and it lists one situation in which an individual may not be adopted — where the individual is a spouse of the petitioner. The Act permits an adult unmarried person to adopt a child; it permits any unmarried father or mother to adopt his own child;

and it permits a married individual without the other spouse joining as a petitioner to adopt an individual if the other spouse is a parent of the person to be adopted and consents to the adoption or the petitioner and the other spouse are legally separated; or the non-joining

spouse is excused from participation by the court by reason of circumstances constituting an unreasonable withholding of consent. Thus, a married individual whose spouse is a missing person or is incapacitated may adopt an individual without the consent of the other spouse.

Commissioners' Note to Section 4 (A.C.A. § 9-9-205)

The name of the appropriate court or division of the court should be inserted in subsection (a) (A.C.A. § 9-9-205(a)) and again in subsection (b) (A.C.A. § 9-9-205(b)).

Jurisdiction is based on residence of either the person seeking to adopt the child or the residence of the child at the time of adoption. The section thus permits the parents to bring the adoption action in the court of the place where the agency

making the placement is located. If the placement is "an independent placement" or by an agency in another state, the petitioners may bring the proceeding in the place of their own residence if they have resided in the state for 6 months preceding the filing of the petition.

Subsection (b) (A.C.A. § 9-9-205(b)) is taken from the Uniform Interstate and International Procedure Act.

Commissioners' Note to Section 5 (A.C.A. § 9-9-206)

In adoption proceedings commenced after placement of the child by an agency, it is contemplated that before the petition for adoption has been filed, that either relinquishment of the right to consent or a court order terminating parental rights under section 19 (A.C.A. § 9-9-220) will have occurred, so that the consent of the natural parent is not required in the adoption proceedings. The persons whose consent may be dispensed with are listed in section 6 (A.C.A. § 9-9-207).

Parental consent is required only where the person to be adopted is a minor child as that term is defined in section 1 (A.C.A. § 9-9-202). If the person to be adopted is an adult or if the person to be adopted is married whether or not he be an adult, the consent of the spouse of the person to be adopted is required.

Subdivision (2) of subsection (a) (A.C.A. § 9-9-206(a)(2)) requires consent of the father of the minor who married the mother after the minor was conceived and who was divorced from the mother before the minor was born. It also requires the father to have a relationship to the child amounting to more than a mere acknowledgment of determination of paternity before his consent is required. Modern cases hold that the "putative father has no parental rights and no right to notice of any hearing prior to such [voluntary termina-

tion of parental rights by the natural mother]" proceedings. See *State ex rel. Lewis et al. v. Lutheran Social Services of Wisconsin and Upper Michigan* (Wis.1970) 178 N.W.2d 56, and *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126.

Under the laws of many states, the natural father legitimates the child of an unwed mother by marriage to her or by receiving the child into his own home and publicly treating the child as his. The proposed Uniform Legitimacy Act, which has not yet been approved by the National Conference, will likely specify the circumstances under which consent of the unwed father to adoption is required. Accordingly, a state enacting the Revised Uniform Adoption Act should select the bracketed language that is appropriate at the time of enactment.

Subsection (a)(3) (A.C.A. § 9-9-206(a)(3)) includes a father having custody of his illegitimate minor child, a legal guardian, or an agency authorized to place the child. If the legal guardian is not empowered to consent to the adoption of the minor child, the court having jurisdiction of the custody of the minor may consent in place of the guardian.

Subsection (a)(5) (A.C.A. § 9-9-206(a)(5)) requires the consent of the person to be adopted if he is more than 10 years old of age, but flexibility is introduced by

permitting the court to dispense with his consent. Apparently, there are cases particularly of "stepchildren" in which the child does not know that he is a stepchild

and in terms of his best interest, it would be better not to disclose to him at the time of the adoption proceedings that he is being adopted by a stepfather.

Commissioners' Note to Section 6 (A.C.A. § 9-9-207)

This section deals primarily with legal excuses for not offering the consent of a parent or guardian. In an agency placement the excuse most likely will be that in subsections (a)(4) (A.C.A. § 9-9-207(a)(4)) and (5) (A.C.A. § 9-9-207(a)(5)) where prior to the proceeding the parent has relinquished his rights or the rights have been terminated under section 19 (A.C.A. § 9-9-220) or other appropriate judicial proceedings.

Subsections (1) (A.C.A. § 9-9-207(a)(1)) and (2) (A.C.A. § 9-9-207(a)(2)) excuse termination of parental rights in a separate proceeding where the child has been abandoned or the parent has deserted the child. Subsection (a)(1) (A.C.A. § 9-9-207(a)(1)) would require the court to find (after notice under section 11 (A.C.A. § 9-9-212)) that the child has been abandoned. If the evidence otherwise establishes the requisite intent, this fact may be found even after a relatively short time of desertion or abandonment. Subsection (a)(2) (A.C.A. § 9-9-207(a)(2)) is designed to permit the court to find that consent to adoption is unnecessary without finding

that the parent has "abandoned" the child by the court finding the existence of certain facts of a prescribed duration. Failure to attempt to communicate with the child for 3 years "when the parent is able to do so" or failure to provide support for the child "when the parent is able to do so" for one year permit the court to find that the consent of the parent is unnecessary. The phrase "when able to do so" would permit the court to hold the subsection inapplicable if the failure to communicate or to provide support was due to the actions of the person having custody of the child preventing the parent from communicating or supporting the child.

If the state defines an adult in section 1 (A.C.A. § 9-9-202) as an individual 18 or more years of age, subparagraph (7)(i)* should be utilized only if the state chooses to authorize the adoption of an individual less than 18 years of age without parental consent and the Court dispenses with such consent.

*The Arkansas version is different.

Commissioners' Note to Section 7 (A.C.A. § 9-9-208)

This section is intended to prescribe the method by which consents may be executed. Consents executed "in the presence of the court" need no further formalities. Consents otherwise executed must be executed in the presence of a person authorized to take acknowledgments. The method for executing a consent should be distinguished from the method for relinquishment of a right to consent which is prescribed in section 19 (A.C.A. § 9-9-220).

Subsection (b) (A.C.A. § 9-9-208(b)) is designed to clarify a point which seems to be ambiguous under some law as to whether the consent must be a consent to the adoption by a particular individual. The subsection authorized a consent "in blank" if the form of the consent contains a statement that a person consented vol-

untarily without disclosure of the name or other identification of the adopting parent.

The bracketing of language in subdivision (3) of subsection (a) (A.C.A. § 9-9-208(a)(3))* and the addition of bracketed language in subsection (b) (A.C.A. § 9-9-208(b))** is provided for any state that wishes to follow the recommendation of the Council of the Section on Family Law of the American Bar Association that all consents to adoption by individuals should be executed in the presence of the Court. The Special Committee of the National Conference feels that such a procedural requirement is too severe and unnecessary.

*Brackets are deleted from the Arkansas version.

****Bracketed language is deleted from the Arkansas version.**

Commissioners' Note to Section 8 (A.C.A. § 9-9-209)

This section limits the opportunity of a person to withdraw his consent. No withdrawal is permitted after entry of an interlocutory or final decree of adoption. Withdrawal of consent before entry of the

decree may be made only with the consent of the Court on the basis of a finding that withdrawal of consent is in the best interest of the child.

Commissioners' Note to Section 9 (A.C.A. § 9-9-210)

The language "including those available under a subsidy agreement" in subdivision (6) of subsection (a) (A.C.A. § 9-9-210(a)(6)) was added in 1971 and is a recognition that an agreement between the adoptive parents and a social agency providing financial assistance to the adoptive parents in the event of adoption of the child is a recognizable resource of the adoptive parents. The use of subsidy agreements is a device which has come into prominence since the Revised Uni-

form Adoption Act was approved by the National Conference.

The language "or verification of birth record" in subsection (6)* was added in 1971 and permits verification of birth record, an inexpensive document commonly used as evidence of birth, to serve to identify the adopted child.

*This language is not in the Arkansas version.

Commissioners' Note to Section 10 (A.C.A. § 9-9-211)

This section is taken from section 224(r) of the California Civil Code. The only adoption to which the section is inapplicable is an adoption by a stepparent.

The purpose of this section is to control some of the abuses which appear from time to time in "private placements" by requiring the petitioner to reveal expenditures which he has made in connection

with the adoption. The section does not invalidate the adoption nor make it impossible for the petitioner to adopt the child because, as an example, in return for the prospective mother's promise to consent to the adoption he agreed and paid medical expenses of the mother or any other payments to the mother.

Commissioners' Note to Section 11 (A.C.A. § 9-9-212)

This section establishes the procedure for notices, investigations, and hearings.

Subsection (a) (A.C.A. § 9-9-212(a)) lists the persons who must be given notice of the petition. Normally in an agency placement the consents will have been obtained before the filing of the petition so that no notice need be given. Subsection (a)(3) (A.C.A. § 9-9-212(a)(3)) does require notice be given to a person whose consent is going to be dispensed with on any of the grounds listed in section 6(a)(1) (A.C.A. § 9-9-207(a)(1)) and (2) (A.C.A. § 9-9-207(a)(2)). There will be cases where the consents have not been obtained or where the petitioner chooses to obtain the consents in the presence of the court during

the proceedings and this section makes provision for obtaining the consents after filing of the petition.

Subsection (b) (A.C.A. § 9-9-212(b)) and following sections require, unless dispensed with by the court, or other circumstances, that an investigation be made by a designated person to determine whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor. In an agency placement, the investigation may well have been done prior to the filing of the petition. In private placements, the first opportunity to secure knowledge of the existence of the child may arise as a result of the adoption petition.

Section 12 (A.C.A. § 9-9-213) requires the minor to be resident in the adoptive home for at least 6 months. The commencement of the 6 month period is, under section 12 (A.C.A. § 9-9-213), either the placement by the agency or, in the case of private placements, notification of the fact of custody of the child by the petitioner to the public welfare department.

Commissioners' Note to Section 12 (A.C.A. § 9-9-213)

As indicated in the comment to section 11 (A.C.A. § 9-9-212), this section gives an advantage to agency placement over independent placements. For agency placements, the adoption decree may be entered not less than 6 months after placement by the agency. For independent placements, the commencement of the 6 month period is not the initial custody of the child, but is the time that the department or court has been informed of the custody of the child by the petitioner. Thus, for speedy adoptions an advantage is given either to agency placement or to early notice to the official agencies of the fact of an independent placement.

Many attempts have been made to treat with the so-called "black market" adoption

Subsection (c) (A.C.A. § 9-9-212(c)) requires the report of the investigation to contain a recommendation as to the granting of the petition. The assumption of this section is that the court is entitled to the "expert" judgment of the placement agency or other official making the investigation as well as a report by him of the bare facts.

where the adoptive parents enter a state where the child is and take the child to another state for the adoptive home and there is no supervision of the initial placement. Any penalty on adoption by this procedure, however improper it may be, which prohibits the issuance of an adoption decree may, in fact, work against the best interest of the child if the adoptive home is suitable and desirable for the child. The "penalty" imposed by this section is simply a penalty arising from any failure to give early notice to the supervisory agency in the state where the adoptive home is located. Adoption cannot occur until 6 months after the notice has been given.

Commissioners' Note to Section 13 (A.C.A. § 9-9-214)

This section permits both a final decree of adoption and the entry of an "interlocutory decree" of adoption which ripens automatically into a final decree unless vacated by the court for good cause shown. A number of states have found that the interlocutory decree procedure permits closer supervision of the adoptive home during the initial period and regularizes

the relationship between adoptive parents and child prior to entry of the final decree. This section authorizes the use of that procedure. On the other hand, nothing in this section prevents a court from delaying the hearing for the purpose of investigation or supervision rather than issuing an interlocutory decree to be followed by investigation and supervision.

Commissioners' Note to Section 14 (A.C.A. § 9-9-215)

This section is designed to terminate all relationship of the child to his blood relatives after entry of the interlocutory decree of adoption and to establish at that moment for all purposes the relationship of parent and child between the adoptive parents and the child. The purpose of this section is to give a statutory definition of the "child," for purposes of all statutes, documents, instruments, and the like, which is to govern all situations in which

an expressed provision to the contrary is not made. It is not intended by this section to make the property rights of an adopted child a matter of contract; rather the purpose of this section is to make the person a child for all purposes and leave it to other law, such as the law of inheritance, to determine what the property rights of a child are. By providing a statutory definition for child, the section is intended to make any use of the word "child" or other

similar designation such as "issue," in an instrument include an adopted child unless the instrument expressly provides to the contrary.

The termination of relationship of parent and child between the adopted person and his natural parents and the family of the natural parents follows the trend of modern statutes and is desirable for many

reasons. It eases the transition from old family to new family by providing for a clean final "cutoff" of legal relationships with the old family. It also preserves the secrecy of adoption proceedings as provided in section 16 (A.C.A. § 9-9-217) by reducing the selfish reasons an individual might have to discover his antecedents.

Commissioners' Note to Section 15 (A.C.A. § 9-9-216)

Subsection (b) (A.C.A. § 9-9-216(b)) is designed to impose a very short statute of limitation on an ability to upset a decree of adoption for any failure to comply with the requirements of this Act, including failure of jurisdiction, fraud, or failure to

give notice. The policy of stability in a family relationship, particularly when a young minor is involved, outweighs the possible loss to a person whose rights are cut off through fraud and ignorance.

Commissioners' Note to Section 16 (A.C.A. § 9-9-217)

The opening phrase is designed to negate the impact of any "right to know" law or other statute making public records open to inspection as a matter of right by the newspapers and other persons. It continues the policy of existing adoption acts of making the proceedings confidential in nature.

Subdivision (3)* was added in 1971 so that persons having knowledge of a par-

ticular adoption cannot be required without written authorization to disclose the name and identity of an adoptive parent or adopted child. This provision is intended to meet the problem presented in *Anonymous v. Anonymous*, 298 N.Y.S.2d 345 (N.Y.1969).

*The Arkansas version is different.

Commissioners' Note to Section 17 (A.C.A. § 9-9-218)

The purpose of this section is to require the courts of this state to recognize termination decrees and adoption decrees issued by courts of other places. It is designed to eliminate from litigation in this state any claim that the adoption was granted on grounds or jurisdiction not recognized in this state. Thus, if a foreign nation gives jurisdiction to grant an adoption on the basis of nationality of the petitioners or of the person to be adopted

without regard to residence, the courts of this state are, nevertheless, instructed to recognize the adoption decree. The decree should be given effect as if it were issued by the courts of this state. If in the state of issuance of an adoption decree the adopted child continues to have rights of inheritance from the natural parents, his rights, are, to the extent the law of this state is controlling, nevertheless cut off.

Commissioners' Note to Section 18 (A.C.A. § 9-9-219)

The clerk of the adoption court who has the official record of the adoption decree is directed by this section to secure the issuance of a new birth certificate. Nothing in this section prevents the agency partici-

pating in the adoption process from preparing the new certificate and forwarding it to the appropriate authorities via the clerk of the court.

Commissioners' Note to Section 19 (A.C.A. § 9-9-220)

This section supplies an important omission from a number of earlier adoption acts. Many acts make no provision for relinquishing or terminating the requirement of consent by a parent. While a number of states provided in the Juvenile Court Act or elsewhere in the statutory law a procedure for termination of parental rights, there was nothing in the Adoption Act requiring recognition of such proceedings as a method of eliminating the requirement of parental consent.

This section provides two methods of eliminating the necessity of consent by a parent: voluntary relinquishment of parental rights under subsection (b) (A.C.A. § 9-9-220(b)) by a writing signed by the parent; and a court order terminating parental rights under subsection (c) (A.C.A. § 9-9-220(c)) on the grounds specified in that section. Subsection (c) (A.C.A. § 9-9-220(c)) lists the persons who may petition for termination of parental rights in connection with an adoption proceeding. Nothing in this listing of persons who may be petitioners limits the provisions in

the Juvenile Court or other acts specifying other or additional persons who may petition for termination of parental rights under those acts where no adoption proceeding is pending.

The grounds for terminating parental rights in subsection (c) (A.C.A. § 9-9-220(c)) are more inclusive than the grounds proposed in the Children's Bureau pamphlet referred to in the comment to section 1 (A.C.A. § 9-9-202) and are taken from statutes such as those in California and Wisconsin. The final ground listed in subsection (c) (A.C.A. § 9-9-220(c)) concerns unreasonable withholding of consent to adoption. It can be used in a case where a stepparent and the mother are in custody of the child but the natural father refuses to give consent and withholding of consent is found by the court to be contrary to the best interest of the child. It cannot be used, however, to excuse the absence of consent of a parent who is in legal control of his child or who has custody of the child.

MODEL STATE SUBSIDIZED ADOPTION ACT

(§ 9-9-401 ET SEQ.)

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The Arkansas version of this act does

not follow the same section order as the uniform law. The comments set out below follow the section order of the uniform law and, consequently, do not appear in A.C.A. order.

Comment to § 1 (A.C.A. § 9-9-403)

The Model State Subsidized Adoption Act must be read in conjunction with the Model Regulations. Together they constitute an indivisible unit. The Regulations amplify and particularize the provisions of the Act.

The aim of the Act is to establish within the [Department of Social Services] a per-

manent adoption subsidy program for children certified by the [Department of Social Services] as eligible for subsidy. It is not intended as a substitute for existing adoption programs but as an addition. Its scope is broad enough to include children under the care of either public or licensed private agencies.

Comment to § 2 (A.C.A. § 9-9-402)

To come within the Act, the child to be subsidized (defined as a minor by [State] law) must be under the legal jurisdiction of a public or voluntary licensed agency and legally free for adoption. The Act enumerates the special circumstances in which the child must be situated in order to be eligible for subsidy certification. He must be either: (1) presently in the care of a foster family with whom he has developed and maintained a plainly evidenced positive emotional bond and who seek to adopt him; or (2) he must be difficult to place in a permanent adoptive home because of one or more of the conditions listed above in the Section.

The list of conditions describes the eligible child as:

1. Under a physical or mental disability. For example, he is suffering from some disease or illness or has been born with such physical or mental defects as to make ordinary or non-subsidized adoptive homes unavailable for him. Or,

2. Suffering from an emotional disturbance, the cause of which is irrelevant. Or,

3. Known to be in a category of high risk of either physical or mental disease. For instance, if it is known that the child has suffered some injury at birth which may manifest itself later in some form of

disability, this would constitute a recognized high risk of physical disability. Or if at placement the child is known to be suffering from a physical disease carrying a mental or emotional component which has not yet appeared, the child would be included in a high risk category. Although this category is intended to give wide latitude to decision-makers, "recognized high risk" is limited to disease or disability and does not include social, environmental or status factors. Because a child is born out of wedlock, for example, does not make him a high risk child in spite of the social stigma that attaches to this status. Or,

4. Difficult to place because of age. A specific age is not stated because of widely varying conditions in different areas of the country. Whether his age is three or seven is irrelevant so long as it is a factor in the child's not being placed in an ordinary adoptive home. Or,

5. Difficult to place because of sibling relationship, i.e., fraternal membership in a family group. It is now considered sound casework practice to try to place siblings together. Or,

6. Difficult to place because of racial or ethnic factors. These factors are also left general because they depend on geo-

graphic area and social climate. Racially mixed infants, for instance, were once difficult to place in any home; at the present time they are desirable. A similar change has occurred with Indian children. At one time it was felt necessary to initiate specific programs to attract adoptive parents for these children. They are now

sought after by non-Indian adoptive applicants, but many Indian tribes no longer allow such placements. Or,

7. Difficult to place through any combination of the above. This category is meant to point up that a "condition" may not be exclusive of another condition.

Comment to § 3 (A.C.A. § 9-9-404)

This section empowers the appropriate [State] department to devise an adoption subsidy program. By "ongoing" is meant a regular and continuous program in contrast to a pilot or a time-limited project.

Funding for subsidized adoption is to be provided through State monies allocated to the appropriate department. Since the subsidized adoption program is designed

to be a part of existing child welfare services, rather than a special category, it should be given the same standing as regular adoption and foster care.

Where the appropriate department can obtain funding from voluntary or other public sources for the adoption subsidy program, these sources should be utilized.

Comment to § 4 (A.C.A. § 9-9-407)*

The Act recognizes that most beneficiaries of existing subsidy programs are children who have been adopted by their foster parents. Under the Act such a child, when he is legally free for adoption and under the jurisdiction of a public or licensed voluntary agency, shall be certified for a subsidy when the foster parents seek to adopt him, there is clear evidence of a significant emotional bond between them and the child, and a home study has shown that the foster parents are suitable adoptive parents. In such circumstances the foster parents are assumed to be the most appropriate adoptive parents, and there is no necessity for searching out other possible adoptive families for this child.

The philosophy of the text is that the needs of the child provide the basis for the subsidy. Therefore the financial ability of

the family to meet the child's needs is not a condition for certification for the subsidy.

When persons other than the foster parents seek to adopt the child, before certifying the child for a subsidy, agencies must make reasonable efforts to secure adoptive parents without subsidizing the child. For example, the agency record might indicate on what dates and for how long the child was placed on adoption resource exchanges, when contacts were made with specialized adoption agencies, and what recruitments without subsidy for the child were attempted among potential adoptive parents.

*This section in the Arkansas Code varies significantly from the model act section.

Comment to § 5 (A.C.A. § 9-9-408)*

The written contract for subsidy is to be negotiated prior to the actual adoption placement and becomes effective either at the time of placement or after the adoption decree has been issued. A subsidy that commences with the placement may be for special services like those referred to in the Regulations.

The Regulations define and describe time-limited and long-term subsidies. The

reference to the ceiling of the subsidy to accord with foster family allowances is based on current practice. One of the features of the adoption subsidy program is to provide children in foster care with permanent adoptive homes at no more cost to the State than foster care.

Under the text, the adoptive parents have the responsibility for certifying to the [Department of Social Services] that

the subsidized child remains in their care. The adoptive parents are the initiating parties in certification. They are not asked to disclose their financial situation.

Some conditions, e.g., physical or mental disability, may be alleviated in time and no longer exist. Other conditions, e.g., ethnic factors, age, or emotional ties with his adoptive parents, necessarily continue unchanged. The subsidy will not be continued after the condition ends.

No fixed age has been set for terminating the subsidy, although in the great majority of cases the age of majority should be determinative. Flexibility is necessary to allow children to complete schooling, for example, before the subsidy is cut off. Also, since some children under the program will need special care, treatment and services for an indeterminate

period, the termination of the subsidy at the age of majority would work a hardship for them.

Since the subsidy is designed to provide a child in special circumstances with a permanent adoptive home, the fact that the child has been adopted out of State or that the adoptive family moves out of the State should not affect the continuity of the subsidy.

Records in the subsidized adoption program should be maintained with the same confidentiality as other adoption records. The privacy of parents and children under the program should be afforded the same respect as in other adoptions.

*This section in the Arkansas Code varies significantly from the model act section.

UNIFORM PREMARITAL AGREEMENT ACT

(§ 9-11-401 ET SEQ.)

Prefatory Note

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage. However, despite a lengthy legal history for these premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states. The problems caused by this uncertainty and nonuniformity are greatly exacerbated by the mobility of our population. Nevertheless, this uncertainty and nonuniformity seem reflective not so much of basic policy differences between the states but rather a result of spasmodic, reflexive response to varying factual circumstances at different times. Accordingly, uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances would appear to be both a significant improvement and a goal realistically capable of achievement.

This Act is intended to be relatively limited in scope. Section 1 (A.C.A. § 9-11-401) defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Section 2 (A.C.A. § 9-11-402) requires that a premarital agreement be in writing and signed by both parties. Section 4 (A.C.A. § 9-11-404) provides that a premarital agreement becomes effective upon the marriage of the parties. These sections establish significant parameters. That is, the Act does not deal with agreements between persons who live together but who do not contemplate marriage or who do not marry. Nor does the Act provide for

postnuptial or separation agreements or for oral agreements.

On the other hand, agreements which are embraced by the act are permitted to deal with a wide variety of matters and Section 3 (A.C.A. § 9-11-403) provides an illustrative list of those matters, including spousal support, which may properly be dealt with in a premarital agreement.

Section 6 (A.C.A. § 9-11-406) is the key operative section of the Act and sets forth the conditions under which a premarital agreement is not enforceable. An agreement is not enforceable if the party against whom enforcement is sought proves that (a) he or she did not execute the agreement voluntarily or that (b) the agreement was unconscionable when it was executed and before execution of the agreement, he or she (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, and (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

Even if these conditions are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, and that modification or elimination would cause a party to be eligible for support under a program of public assistance at the time of separation, marital dissolution, or death, a court is authorized to order the other party to provide support to the extent necessary to avoid that eligibility.

These sections form the heart of the Act; the remaining sections deal with more tangential issues. Section 5 (A.C.A. § 9-11-405) prescribes the manner in which a premarital agreement may be amended or revoked; Section 7 (A.C.A. § 9-11-407) provides for very limited enforcement where a marriage is subsequently deter-

mined to be void; and Section 8 (A.C.A. § 9-11-408) tolls any statute of limitations applicable to an action asserting a claim

for relief under a premarital agreement during the parties' marriage.

Comment to § 1 (A.C.A. § 9-11-401)

The definition of "premarital agreement" set forth in subsection (1) (A.C.A. § 9-11-401(1)) is limited to an agreement between prospective spouses made in contemplation of and to be effective upon marriage. Agreements between persons living together but not contemplating marriage (see *Marvin v. Marvin*, 18 Cal.3d 660 (1976), judgment after trial modified, 122 Cal.App.3d 871 (1981)) and postnuptial or separation agreements are outside the scope of this Act. Formal requirements are prescribed by Section 2 (A.C.A. § 9-11-

402). An illustrative list of matters which may be included in an agreement is set forth in Section 3 (A.C.A. § 9-11-403).

Subsection (2) (A.C.A. § 9-11-401(2)) is designed to embrace all forms of property and interests therein. These may include rights in a professional license or practice, employee benefit plans, pension and retirement accounts, and so on. The reference to income or earnings includes both income from property and earnings from personal services.

Comment to § 2 (A.C.A. § 9-11-402)

This section restates the common requirement that a premarital agreement be reduced to writing and signed by both parties (see *Ariz.Rev.Stats.* § 25-201; *Ark.Stats.* § 55-310; *Cal.Civ.C.* § 5134; 13 *Dela.Code* 1974 § 301; *Idaho Code* § 32-917; *Ann.Laws Mass.* ch. 209, § 25; *Minn.Stats.Ann.* § 519.11; *Montana Rev.C.* § 36-123; *New Mex. Stats.Ann.* 1978 40-2-4; *Ore.Rev.Stats.* § 108.140; *Vernon's Texas Codes Ann.* § 5.44; *Vermont Stats.Ann.* Title 12, § 181). Many states also require other formalities, including notarization or an acknowledgement (see, e.g., *Arizona, Arkansas, California, Idaho, Montana, New Mexico*) but may then permit the formal statutory requirement to be avoided or satisfied subsequent to execution (see *In re Marriage of Cleveland*, 76 Cal.App.3d 357 (1977) (premarital agreement never acknowledged but "proved" by sworn testimony of parties in dissolution proceeding)). This act dispenses with all formal requirements except a writing signed by both parties. Although the section is framed in the singular, the agreement may consist of one or more documents intended to be part of the agreement and executed as required by this section.

Section 2 (A.C.A. § 9-11-402) also restates what appears to be the almost universal rule regarding the marriage as consideration for a premarital agreement (see, e.g., *Ga.Code* § 20-303; *Barnhill v.*

Barnhill, 386 So.2d 749 (Ala.Civ.App.1980); *Estate of Gillilan v. Estate of Gillilan*, 406 N.E.2d 981 (Ind.App.1980); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash.1972); but cf. *Wilson v. Wilson*, 170 A.2d 679, 685 (Me.1961)). The primary importance of this rule has been to provide a degree of mutuality of benefits to support the enforceability of a premarital agreement. A marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4 (A.C.A. § 9-11-404)). This requires that there be a ceremonial marriage. Even if this marriage is subsequently determined to have been void, Section 7 (A.C.A. § 9-11-407) may provide limits of enforceability of an agreement entered into in contemplation of that marriage. Consideration as such is not required and the standards for enforceability are established by Sections 6 (A.C.A. § 9-11-406) and 7 (A.C.A. § 9-11-407). Nevertheless, this provision is retained here as a desirable, if not essential, restatement of the law. On the other hand, the fact that marriage is deemed to be consideration for the purpose of this act does not change the rules applicable in other areas of law (see, e.g., 26 U.S.C.A. §§ 2043 (release of certain marital rights not treated as consideration for federal estate tax, 2512; *Merrill v. Fahs*, 324 U.S. 308, rehearing denied, 324 U.S. 888 (release of marital rights in premarital

agreement not adequate and full consideration for purposes of federal gift tax).

Finally, a premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding

agreement. Those persons who lack the capacity to contract but who under other provisions of law are permitted to enter into a binding agreement may enter into a premarital agreement under those other provisions of law.

Comment to § 3 (A.C.A. § 9-11-403)

Section 3 (A.C.A. § 9-11-403) permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. The matters are intended to be illustrative, not exclusive. Paragraph (4) of subsection (a) (A.C.A. § 9-11-403(a)(4)) specifically authorizes the parties to deal with spousal support obligations. There is a split in authority among the states as to whether a premarital agreement may control the issue of spousal support. Some few states do not permit a premarital agreement to control this issue (see, e.g., *In re Marriage of Winegard*, 278 N.W.2d 505 (Iowa 1979); *Fricke v. Fricke*, 42 N.W.2d 500 (Wis.1950)). However, the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards (see, e.g., *Newman v. Newman*, 653 P.2d 728

(*Colo.Sup.Ct.*1982); *Parniawski v. Parniawski*, 359 A.2d 719 (Conn.1976); *Valid v. Valid*, 286 N.E.2d 42 (Ill.1972); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass.1981); *Hudson v. Hudson*, 350 P.2d 596 (Okla.1960); *Unander v. Unander*, 506 P.2d 719 (Ore.1973)) (see Sections 7 (A.C.A. § 9-11-407) and 8 (A.C.A. § 9-11-408)).

Paragraph (8) of subsection (a) (A.C.A. § 9-11-403(a)(8)) makes clear that the parties may also contract with respect to other matters, including personal rights and obligations, not in violation of public policy or a criminal statute. Hence, subject to this limitation, an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on. However, subsection (b) (A.C.A. § 9-11-403(b)) of this section makes clear that an agreement may not adversely affect what would otherwise be the obligation of a party to a child.

Comment to § 4 (A.C.A. § 9-11-404)

This section establishes a marriage as a prerequisite for the effectiveness of a premarital agreement. As a consequence, the act does not provide for a situation where persons live together without marrying.

In that situation, the parties must look to the other law of the jurisdiction (see *Marvin v. Marvin*, 18 Cal.3d 660 (1976); judgment after trial modified, 122 Cal.App.3d 871 (1981)).

Comment to § 5 (A.C.A. § 9-11-405)

This section requires the same formalities of execution for an amendment or revocation of a premarital agreement as are required for its original execution (cf.

Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind.App.1980) (agreement may be altered by subsequent agreement but not simply by inconsistent acts).

Comment to § 6 (A.C.A. § 9-11-406)

This section sets forth the conditions which must be proven to avoid the enforcement of a premarital agreement. If prospective spouses enter into a premarital agreement and their subsequent mar-

riage is determined to be void, the enforceability of the agreement is governed by Section 7 (A.C.A. § 9-11-407).

The conditions stated under subsection (a) (A.C.A. § 9-11-406(a)) are comparable

to concepts which are expressed in the statutory and decisional law of many jurisdictions. Enforcement based on disclosure and voluntary execution is perhaps most common (see, e.g., Ark.Stats. § 55-309 [Repealed]; Minn.Stats. Ann. § 519.11; In re Kaufmann's Estate, 171 A.2d 48 (Pa.1961) (alternate holding)). However, knowledge or reason to know, together with voluntary execution, may also be sufficient (see, e.g., Tenn.Code Ann. § 36-606; Barnhill v. Barnhill, 386 So.2d 479 (Ala.Civ.App.1980); Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962); Coward v. Coward, 582 P.2d 834 (Or.App.1978); but see Matter of Estate of Lebsock, 618 P.2d 683 (Colo.App.1980)) and so may a voluntary, knowing waiver (see Hafner v. Hafner, 295 N.W.2d 567 (Minn.1980)). In each of these situations, it should be underscored that execution must have been voluntary (see Lutgert v. Lutgert, 338 So.2d 1111 (Fla.1976); see also 13 Dela.Code 1974 § 301 (10 day waiting period)). Finally, a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed (cf. Hartz v. Hartz, 234 A.2d 865 (Md.1967) (premarital agreement upheld if no disclosure but agreement was fair and equitable under the circumstances)).

The test of "unconscionability" is drawn from Section 306 of the Uniform Marriage and Divorce Act (UMDA) (see Ferry v. Ferry, 586 S.W.2d 782 (Mo.1979); see also Newman v. Newman, 653 P.2d 728 (Colo.Sup.Ct. 1982) (maintenance provisions of premarital agreement tested for unconscionability at time of marriage termination)). The following discussion set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:

"Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, Scott v. U.S., 12 Wall (U.S.) 443

(1870) ('contract ... unreasonable and unconscionable but not void for fraud'); Stiefler v. McCullough 174 N.E. 823, 97 Ind.App. 123 (1931); Terre Haute Coöperage v. Branscome, 35 So.2d 537, 203 Miss. 493 (1948); Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. Bell v. Bell, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

"In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing." (Commissioner's Note, Sec. 306, Uniform Marriage and Divorce Act.)

Nothing in Section 6 (A.C.A. § 9-11-406) makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 (A.C.A. § 9-11-406) may have existed (see, e.g., Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962)).

Even if the conditions stated in subsection (a) (A.C.A. § 9-11-406(a)) are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, subsection (b) (A.C.A. § 9-11-406(b)) authorizes a court to provide very limited relief to a party who would otherwise be eligible for public welfare (see, e.g., Osborne v. Osborne, 428 N.E.2d 810 (Mass.1981) (dictum); Unander v. Unander, 506 P.2d 719 (Ore.1973) (dictum)).

No special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable under otherwise applicable law (see *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (Ct.App.)).

Section 6 (A.C.A. § 9-11-406) is framed in a manner to require the party who alleges that a premarital agreement is not enforceable to bear the burden of proof as to that allegation. The statutory law conflicts on the issue of where the burden of proof lies (contrast Ark.Stats. § 55-313 [Repealed]; 31 Minn.Stats.Ann. § 519.11 with Vernon's Texas Codes Ann. § 5.45). Similarly, some courts have placed the burden on the attacking spouse to prove the invalidity of the agreement. *Linker v. Linker*, 470 P.2d 921 (Colo.1970); *Matter*

of Estate of Benker, 296 N.W.2d 167 (Mich.App.1980); *In re Kauffmann's Estate*, 171 A.2d 48 (Pa.1961). Some have placed the burden upon those relying upon the agreement to prove its validity. *Hartz v. Hartz*, 234 A.2d 865 (Md.1967). Finally, several have adopted a middle ground by stating that a premarital agreement is presumptively valid but if a disproportionate disposition is made for the wife, the husband bears the burden of proof of showing adequate disclosure. *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla.1962); *Christians v. Christians*, 44 N.W.2d 431 (Iowa 1950); *In re Neis' Estate*, 225 P.2d 110 (Kan.1950); *Truitt v. Truitt's Adm'r*, 162 S.W.2d 31 (Ky.1942); *In re Estate of Strickland*, 149 N.W.2d 344 (Neb.1967); *Kosik v. George*, 452 P.2d 560 (Or.1969); *Friedlander v. Friedlander*, 494 P.2d 208 (Wash.1972).

Comment to § 7 (A.C.A. § 9-11-407)

Under this section a void marriage does not completely invalidate a premarital agreement but does substantially limit its enforceability. Where parties have married and lived together for a substantial period of time and one or both have relied on the existence of a premarital agree-

ment, the failure to enforce the agreement may well be inequitable. This section, accordingly, provides the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result (see Annot., 46 A.L.R.3d 1403).

Comment to § 8 (A.C.A. § 9-11-408)

In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 (A.C.A. § 9-11-408) tolls any applicable statute during the marriage of the parties (contrast *Dykema v. Dykema*,

412 N.E.2d 13 (Ill.App.1980) (statute of limitations not tolled where fraud not adequately pleaded, hence premarital agreement enforced at death)). However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.

Comment to § 9 (A.C.A. § 9-11-409)

Section 9 (A.C.A. § 9-11-409) is a standard provision in all Uniform Acts.

Comment to § 10 (A.C.A. § 9-11-410)

This is the customary "short title" clause, which may be placed in that order

in the bill for enactment as the legislative practice of the state prescribes.

Comment to § 11 (A.C.A. § 9-11-411)

Section 11 (A.C.A. § 9-11-411) is a standard provision included in certain Uniform Acts.

UNIFORM CHILD CUSTODY JURISDICTION ACT

(§ 9-13-201 ET SEQ.)

Prefatory Note

There is growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. Children of separated parents may live with their mother, for example, but one day the father snatches them and brings them to another state where he petitions a court to award him custody while the mother starts custody proceedings in her state; or in the case of illness of the mother the children may be cared for by grandparents in a third state, and all three parties may fight over the right to keep the children in several states. These and many similar situations constantly arise in our mobile society where family members often are scattered all over the United States and at times over other countries. A young child may have been moved to another state repeatedly before the case goes to court. When a decree has been rendered awarding custody to one of the parties, this is by no means the end of the child's migrations. It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find — and often do find — a more sympathetic ear for their plea for custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years, with the child thrown back and forth from state to state, never coming to rest in one single home and in one community.

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection.

A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.

This unfortunate state of affairs has been aided and facilitated rather than discouraged by the law. There is no statutory law in this area and the judicial law is so unsettled that it seems to offer nothing but a "quicksand foundation" to stand on. See Leflar, *American Conflicts Law* 585 (1968). See also Clark, *Domestic Relations* 320 (1968). There is no certainty as to which state has jurisdiction when persons seeking custody of a child approach the courts of several states simultaneously or successively. There is no certainty as to whether a custody decree rendered in one state is entitled to recognition and enforcement in another; nor as to when one state may alter a custody decree of a sister state.

The judicial trend has been toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state, with little regard to any conflict of law rules. See Leflar, *American Conflicts Law* 585-6 (1968) and Leflar, *1967 Annual Survey of American Law, Conflict of Laws* 26 (1968). Also, since the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees, many states have felt free to modify custody decrees of sister states almost at random although the theory usually is that there has been a change of circumstances requiring a custody award to a different person. Compare *People ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); and see Comment, *Ford v. Ford: Full Faith and Credit To Child Custody Decrees?*, 73 *Yale L. J.* 134 (1963). Generally speaking, there has been a tendency to over-emphasize the

need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made. Compare Clark, *Domestic Relations* 326 (1968).

Under this state of the law the courts of the various states have acted in isolation and at times in competition with each other; often with disastrous consequences. A court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father. See *Stout v. Pate*, 209 Ga. 786, 75 S.E.2d 748 (1953) and *Stout v. Pate*, 120 Cal. App. 2d 699, 261 P.2d 788 (1953), cert. denied in both cases 347 U.S. 968, 74 S. Ct. 744, 776, 98 L. Ed. 1109, 1110 (1954); *Moniz v. Moniz*, 142 Cal. App. 2d 527, 298 P.2d 710 (1956); and *Sharpe v. Sharpe*, 77 Ill. App. 2d 295, 222 N.E.2d 340 (1966). In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also, a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues. See *Com. ex rel. Thomas v. Gillard*, 203 Pa. Super. 95, 198 A.2d 377 (1964); *In re Guardianship of Rodgers*, 100 Ariz. 269, 413 P.2d 774 (1966); *Berlin v. Berlin*, 239 Md. 52, 210 A.2d 380 (1965); *Berlin v. Berlin*, 21 N.Y.2d 371, 235 N.E.2d 109 (1967), cert. denied, 37 L.W. 3123 (1968); and *Batchelor v. Fulcher*, 415 S.W.2d 828 (Ky. 1967).

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuvers of

doubtful legality may place their clients at a decided disadvantage.

To remedy this intolerable state of affairs where self-help and the rule of "seize-and-run" prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards. See Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795 (1964); Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. Cal. L. Rev. 183 (1965); and Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings*, 64 Mich. L. Rev. 1 (1965). In drafting this Act, the National Conference of Commissioners has drawn heavily on the work of these authors and has consulted with other leading authorities in the field. The American Bar Association has taken an active part in furthering the project.

The Act is designed to bring some semblance of order into the existing chaos. It limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3 (A.C.A. § 9-13-203). It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 (A.C.A. § 9-13-213) and 15 (A.C.A. § 9-13-215). Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14 (A.C.A. § 9-13-214). Access to a court may be denied to petitioners who have engaged in child snatching or similar practices. See Section 8 (A.C.A. § 9-13-208). Also, the Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and bring about interstate judicial assistance in custody cases.

The Act stresses the importance of the personal appearance before the court of nonresidents who claim custody, and of the child himself, and provides for the payment of travel expenses for this purpose. See Section 11 (A.C.A. § 9-13-211). Further provisions insure that the judge receives necessary out-of-state information with the assistance of courts in other states. See Sections 17 (A.C.A. § 9-13-217) through 22 (A.C.A. § 9-13-222).

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important which court exercises jurisdiction but that courts of the several

states involved act in partnership to bring about the best possible solution for a child's future.

The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states. But its full benefits will not be reaped until a large number of states have enacted it, and until the courts, perhaps aided by regional or national conferences, have come to develop a new, truly "inter-state" approach to child custody litigation. The general policies of the Act and some of its specific provisions apply to international custody cases.

Comment to Section 1 (A.C.A. § 9-13-201)

Because this uniform law breaks new ground not previously covered by legislation, its purposes are stated in some de-

tail. Each section must be read and applied with these purposes in mind.

Comment to Section 2 (A.C.A. § 9-13-202)

Subsection (3) (A.C.A. § 9-13-202(3)) indicates that "custody proceeding" is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to deter-

mine custody. See Clark, *Domestic Relations* 576-582 (1968).

Other definitions are explained, if necessary, in the comments to the sections which use the terms defined.

Comment to Section 3 (A.C.A. § 9-13-203)

Paragraphs (1) and (2) of subsection (a) (A.C.A. § 9-13-203(a)(1) and (2)) establish the two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 (A.C.A. § 9-13-206) and 7 (A.C.A. § 9-13-207) are used to assure that only one state makes the custody decision.

"Home state" is defined in section 2(5) (A.C.A. § 9-13-202(5)). A 6-month period has been selected in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact. See Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795, 818 (1964) who explains:

"Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."

Subparagraph (ii) of paragraph (1) (A.C.A. § 9-13-203(a)(1)(ii)) extends the home state rule for an additional six-month period in order to permit suit in the home state after the child's departure. The main objective is to protect a parent who has been left by his spouse taking the child along. The provision makes clear that the stay-at-home parent, if he acts promptly, may start proceedings in his own state if he desires, without the necessity of attempting to base jurisdiction on paragraph (2) (A.C.A. § 9-13-203(a)(2)). This changes the law in those states which required presence of the child as a condition for jurisdiction and conse-

quently forced the person left behind to follow the departed person to another state, perhaps to several states in succession. See also subsection (c) (A.C.A. § 9-13-203(c)).

Paragraph (2) (A.C.A. § 9-13-203(a)(2)) comes into play either when the home state test cannot be met or as an alternative to that test. The first situation arises, for example, when a family has moved frequently and there is no state where the child has lived for 6 months prior to suit, or if the child has recently been removed from his home state and the person who was left behind has also moved away. See paragraph (1) (A.C.A. § 9-13-203(a)(1)), last clause. A typical example of alternative jurisdiction is the case in which the stay-at-home parent chooses to follow the departed spouse to state 2 (where the child has lived for several months with the other parent) and starts proceedings there. Whether the departed parent also has access to a court in state 2, depends on the strength of the family ties in that state and on the applicability of the clean hands provision of section 8 (A.C.A. § 9-13-208). If state 2, for example, was the state of the matrimonial home where the entire family lived for two years before moving to the "home state" for 6 months, and the wife returned to state 2 with the child with the consent of the husband, state 2 might well have jurisdiction upon the petition of the wife. The same may be true if the wife returned to her parents in her former home state where the child had spent several months every year before. Compare *Willmore v. Willmore*, 273 Minn. 537, 143 N.W.2d 630 (1966), cert. denied, 385 U.S. 898 (1966). While jurisdiction may exist in two states in these instances, it will not be exercised in both states. See sections 6 (A.C.A. § 9-13-206) and 7 (A.C.A. § 9-13-207).

Paragraph (2) of subsection (a) (A.C.A. § 9-13-203(a)(2)) is supplemented by subsection (b) (A.C.A. § 9-13-203(b)) which is designed to discourage unilateral removal of children to other states and to guard generally against too liberal an interpretation of paragraph (2) (A.C.A. § 9-13-203(a)(2)). Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical "domicile" for divorce or other purposes.

Paragraph (2) (A.C.A. § 9-13-203(a)(2))

perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1 (A.C.A. § 9-13-201). The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and the family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. See *Clark, Domestic Relations* 578 (1968).

Paragraph (3) of subsection (a) (A.C.A. § 9-13-203(a)(3)) retains and reaffirms *parens patriae* jurisdiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. This jurisdiction exists when a child has been abandoned and in emergency cases of child neglect. Presence of the child in the state is the only prerequisite. This extraordinary jurisdiction is reserved for extraordinary circumstances. See *Application of Lang*, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959). When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph.

Paragraph (4) of subsection (a) (A.C.A. § 9-13-203(a)(4)) provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, or would, assume jurisdiction under the other criteria of this section.

Subsection (c) (A.C.A. § 9-13-203(c)) makes it clear that presence of the child is not a jurisdictional requirement. Subsequent sections are designed to assure the appearance of the child before the court.

This section governs jurisdiction to make an initial decree as well as a modification decree. Both terms are defined in section 2 (A.C.A. § 9-13-202). Jurisdiction

to modify an initial or modification decree of another state is subject to additional restrictions contained in sections 8(b)

(A.C.A. § 9-13-208(b)) and 14(a) (A.C.A. § 9-13-214(a)).

Comment to Section 4 (A.C.A. § 9-13-204)

This section lists the persons who must be notified and given an opportunity to be heard to satisfy the due process requirements. As to persons in the forum state, the general law of the state applies; others are notified in accordance with section 5 (A.C.A. § 9-13-205). Strict compliance with sections 4 (A.C.A. § 9-13-204) and 5 (A.C.A. § 9-13-205) is essential for the

validity of a custody decree within the state and its recognition and enforcement in other states under sections 12 (A.C.A. § 9-13-212), 13 (A.C.A. § 9-13-213), and 15 (A.C.A. § 9-13-215). See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft sec. 69 (1967); and compare *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

Comment to Section 5 (A.C.A. § 9-13-205)

Section 2.01 of the Uniform Interstate and International Procedure Act has been followed to a large extent. See 9B U.L.A. 315 (1966). If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts cannot be reached. See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and *Schroeder v. City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962).

Notice by publication in lieu of other means of notification is not included because of its doubtful constitutionality. See *Mullane v. Central Hanover Bank and Trust Co.*, *supra*; and see Hazard, A General Theory of State-Court Jurisdiction,

1965 Supreme Court Rev. 241, 277, 286-87. Paragraph (4) of subsection (a) (A.C.A. § 9-13-205(a)(4)) lists notice by publication in brackets for the benefit of those states which desire to use published notices in addition to the modes of notification provided in this section when these modes prove ineffective to impart actual notice.*

The provisions of this section, and paragraphs (2) and (4) of subsection (a) (A.C.A. § 9-13-205(a)(2) and (a)(4)) in particular, are subject to the caveat that notice and opportunity to be heard must always meet due process requirements as they exist at the time of the proceeding.

*The Arkansas version deleted the brackets.

Comment to Section 6 (A.C.A. § 9-13-206)

Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods. Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states. In a proper case jurisdiction is yielded to the other state either under this section or under section 7 (A.C.A. § 9-13-207). Both sections must be read together.

When the courts of more than one state

have jurisdiction under sections 3 (A.C.A. § 9-13-203) or 14 (A.C.A. § 9-13-214), priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 (A.C.A. § 9-13-207) may result in the handling of the case by the other court.

While jurisdiction need not be yielded under subsection (a) (A.C.A. § 9-13-206(a)) if the other court would not have jurisdiction under the criteria of this Act, the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to

leave the case to the other court even under such circumstances. See subsection (3) and section 7 (A.C.A. § 9-13-207).

Once a custody decree has been ren-

dered in one state, jurisdiction is determined by sections 8 (A.C.A. § 9-13-208) and 14 (A.C.A. § 9-13-214).

Comment to Section 7 (A.C.A. § 9-13-207)

The purpose of this provision is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child. It serves as a second check on jurisdiction once the test of sections 3 (A.C.A. § 9-13-203) or 14 (A.C.A. § 9-13-214) has been met.

The section is a particular application of the inconvenient forum principle, recognized in most states by judicial law, adapted to the special needs of child custody cases. The terminology used follows section 84 of the Restatement of the Law Second, Conflict of Laws, Proposed Official Draft (1967). Judicial restrictions or exceptions to the inconvenient forum rule made in some states do not apply to this statutory scheme which is limited to child custody cases.

Like section 6 (A.C.A. § 9-13-206), this section stresses interstate judicial communication and cooperation. When there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved.

Paragraphs (1) through (5) of subsection (c) (A.C.A. § 9-13-207(c)(1)-(5)) specify some, but not all, considerations which enter into a court determination of incon-

venient forum. Factors customarily listed for purposes of the general principle of the inconvenient forum (such as convenience of the parties and hardship to the defendant) are also pertinent, but may under the circumstances be of secondary importance because the child who is not a party is the central figure in the proceedings.

Part of subsection (e) (A.C.A. § 9-13-207(e)) is derived from Wis. Stat. Ann., sec. 262.19(1).

Subsection (f) (A.C.A. § 9-13-207(f)) makes it clear that a court may divide a case, that is, dismiss part of it and retain the rest. See section 1.05 of the Uniform Interstate and International Procedure Act. When the custody issue comes up in a divorce proceeding, courts may have frequent occasion to decline jurisdiction as to that issue (assuming that custody jurisdiction exists under sections 3 (A.C.A. § 9-13-203) or 14 (A.C.A. § 9-13-214)).

Subsection (g) (A.C.A. § 9-13-207(g)) is an adaptation of Wis. Stat. Ann., sec. 262.20. Its purpose is to serve as a deterrent against "frivolous jurisdiction claims," as G.W. Foster states in the Revision Notes to the Wisconsin provision. It applies when the forum chosen is seriously inappropriate considering the jurisdictional requirements of the Act.

Comment to Section 8 (A.C.A. § 9-13-208)

This section incorporates the "clean hands doctrine," so named by Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345 (1953). Under this doctrine courts refuse to assume jurisdiction to reexamine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain physical custody of the child in violation of the decree. See *Fain, Custody of Children*, The California Family Lawyer I, 539, 546 (1961); *Ex Parte Mullins*, 26 Wash. 2d 419, 174 P.2d 790 (1946); *Crocker v. Crocker*, 122 Colo. 49, 219 P.2d 311 (1950); and *Leathers v. Leathers*, 162

Cal. App. 2d 768, 328 P.2d 853 (1958). But when adherence to this rule would lead to punishment of the parent at the expense of the wellbeing of the child, it is often not applied. See *Smith v. Smith*, 135 Cal. App. 2d 100, 286 P.2d 1009 (1955) and *In re Guardianship of Rodgers*, 100 Ariz. 269, 413 P.2d 744 (1966).

Subsection (a) (A.C.A. § 9-13-208(a)) extends the clean hands principle to cases in which a custody decree has not yet been rendered in any state. For example, if upon a de facto separation the wife returned to her own home with the children without objection by her husband and lived there for two years without hearing

from him, and the husband without warning forcibly removes the children one night and brings them to another state, a court in that state although it has jurisdiction after 6 months may decline to hear the husband's custody petition. "Wrongfully" taking under this subsection does not mean that a "right" has been violated — both husband and wife as a rule have a right to custody until a court determination is made — but that one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction.

Subsection (b) (A.C.A. § 9-13-208(b)) does not come into operation unless the court has power under section 14 (A.C.A. § 9-13-214) to modify the custody decree of another state. It is a codification of the clean hands rule, except that it differentiates between (1) a taking or retention of the child and (2) other violations of custody decrees. In the case of illegal removal or retention, refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the

parental misconduct. Compare *Smith v. Smith* and *In re Guardianship of Rodgers*, supra; and see *In re Walter*, 228 Cal. App. 2d 217, 39 Cal. Rpts. 243 (1964) where the court assumed jurisdiction after both parents had been guilty of misconduct. The qualifying word "improperly" is added to exclude cases in which a child is withheld because of illness or other emergency or in which there are other special justifying circumstances.

The most common violation of the second category is the removal of the child from the state by the parent who has the right to custody, thereby frustrating the exercise of visitation rights of the other parent. The second sentence of subsection (b) (A.C.A. § 9-13-208(b)) makes refusal of jurisdiction entirely discretionary in this situation because it depends on the circumstances whether non-compliance with the court order is serious enough to warrant the drastic sanction of denial of jurisdiction.

Subsection (c) (A.C.A. § 9-13-208(c)) adds a financial deterrent to child stealing and similar reprehensible conduct.

Comment to Section 9 (A.C.A. § 9-13-209)

It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be

contacted under various provisions of the Act. Information as to custody litigation and other pertinent facts occurring in other countries may also be elicited under this section in combination with section 23 (A.C.A. § 9-13-223).

Comment to Section 10 (A.C.A. § 9-13-210)

The purpose of this section is to prevent re-litigations of the custody issue when these would be for the benefit of third claimants rather than the child. If the immediate controversy, for example, is between the parents, but relatives inside or outside the state also claim custody or

have physical custody which may lead to a future claim to the child, they must be brought into the proceedings. The courts are given an active role here as under other sections of the Act to seek out the necessary information from formal or informal sources.

Comment to Section 11 (A.C.A. § 9-13-211)

Since a custody proceeding is concerned with the past and future care of the child by one of the parties, it is of vital importance in most cases that the judge has an opportunity to see and hear the contestants and the child. Subsection (a) (A.C.A. § 9-13-211(a)) authorizes the court to order the appearance of these persons if

they are in the state. It is placed in brackets because states which have such a provision — not only in their juvenile court laws — may wish to omit it. Subsection (b) (A.C.A. § 9-13-211(b)) relates to the appearance of persons who are outside the state and provides one method of bringing them before the court; sections

19(b) (A.C.A. § 9-13-219(b)) and 20(b) (A.C.A. § 9-13-220(b)) provide another. Subsection (c) (A.C.A. § 9-13-220(c)) helps to finance travel to the court which may be

close to one of the parties and distant from another; it may be used to equalize the expense if this is appropriate under the circumstances.

Comment to Section 12 (A.C.A. § 9-13-212)

This section deals with the intra-state validity of custody decrees which provide the basis for their interstate recognition and enforcement. The two prerequisites are (1) jurisdiction under section 3 (A.C.A. § 9-13-203) of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard. There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions (see section 2(2) (A.C.A. § 9-13-202(2)), *supra*), are proceedings in rem or proceedings affecting status. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 69 and 79 (1967); and James, Civil Procedure 613 (1965). For a different theory reaching the same result, see Hazard, A General Theory of State-Court Jurisdiction, 1965 Supreme Court

Review 241. The section is not at variance with *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953), which relates to interstate recognition rather than in-state validity of custody decrees. See Ehrenzweig and Louisell, Jurisdiction in a Nutshell 76 (2d ed. 1968); and compare Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L. Rev. 183, 195 (1957). On *May v. Anderson*, *supra*, see comment to section 13 (A.C.A. § 9-13-213).

Since a custody decree is normally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967).

Comment to Section 13 (A.C.A. § 9-13-213)

This section and sections 14 (A.C.A. § 9-13-214) and 15 (A.C.A. § 9-13-215) are the key provisions which guarantee a great measure of security and stability of environment to the "interstate child" by discouraging re-litigations in other states. See section 1 (A.C.A. § 9-13-201), and see Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 828 (1964).

Although the full faith and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967), and see the Prefatory Note, *supra*. This section declares as a matter of state law, that custody decrees of sister states will be recognized and enforced. Recognition and enforcement is mandatory if the state in which the prior decree was rendered 1) has adopted this Act, 2) has statutory jurisdictional requirements substantially like this Act, or 3) would have had jurisdiction under the facts of this case if this Act had been the

law in the state. Compare Comment, Ford v. Ford: Full Faith and Credit to Child Custody Decrees?, 73 Yale L.J. 134, 148 (1963).

"Jurisdiction" or "jurisdictional standards" under this section refers to the requirements of section 3 (A.C.A. § 9-13-203) in the case of initial decrees and to the requirements of sections 3 (A.C.A. § 9-13-203) and 14 (A.C.A. § 9-13-214) in the case of modification decrees. The section leaves open the possibility of discretionary recognition of custody decrees of other states beyond the enumerated situations of mandatory acceptance. For the recognition of custody decrees of other nations, see section 23 (A.C.A. § 9-13-223).

Recognition is accorded to a decree which is valid and binding under section 12 (A.C.A. § 9-13-212). This means, for example, that a court in the state where the father resides will recognize and enforce a custody decree rendered in the home state where the child lives with the mother if the father was duly notified and

given enough time to appear in the proceedings. Personal jurisdiction over the father is not required. See comment to section 12 (A.C.A. § 9-13-212). This is in accord with a common interpretation of the inconclusive decision in *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953). See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 79 and Comment thereto, p. 298 (1967). Under this interpretation a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met. See Justice Frankfurter's concurring opinion in *May v. Anderson*; and compare *Clark, Domestic Relations* 323-26 (1968), *Goodrich, Conflict of Laws* 274 (4th ed. by Scales, 1964); *Stumberg, Principles of Conflict of Laws* 325 (3rd ed. 1963); and Comment, *The Puzzle of Jurisdiction in Child Custody Actions*, 38 U. Colo. L. Rev. 541 (1966). The Act emphasizes the need for the personal appearance of the contestants rather than any technical requirement for personal jurisdiction.

The mandate of this section could cause

problems if the prior decree is a punitive or disciplinary measure. See *Ehrenzweig, Inter-state Recognition of Custody Decrees*, 51 Mich. L. Rev. 345, 370 (1953). If, for example, a court grants custody to the mother and after 5 years of continuous life with the mother the child is awarded to the father by the same court for the sole reason that the mother who had moved to another state upon remarriage had not lived up to the visitation requirements of the decree, courts in other states may be reluctant to recognize the changed decree. See *Berlin v. Berlin*, 21 N.Y.2d 371, 235 N.E.2d 109 (1967); and *Stout v. Pate*, 120 Cal. App. 2d 699, 261 P.2d 788 (1953); Compare *Moniz v. Moniz*, 142 Cal. App. 2d 527, 298 P.2d 710 (1956). Disciplinary decrees of this type can be avoided under this Act by enforcing the visitation provisions of the decree directly in another state. See section 15 (A.C.A. § 9-13-215). If the original plan for visitation does not fit the new conditions, a petition for modification of the visiting arrangements would be filed in a court which has jurisdiction, that is, in many cases the original court. See section 14 (A.C.A. § 9-13-214).

Comment to Section 14 (A.C.A. § 9-13-214)

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. See *People ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) (A.C.A. § 9-13-214(a)) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3 (A.C.A. § 9-13-203). The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become

slight, modification jurisdiction would shift elsewhere. Compare *Ratner, Child Custody in a Federal System*, 62 Mich. L. Rev. 795, 821-2 (1964).

For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 61/2 months (31/2 months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. See *Clark, Domestic Relations* 322-23 (1968). Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease. Compare *Brengle v.*

Hurst, 408 S.W.2d 418 (Ky. 1966). The situation would be different if the children had been abducted and their whereabouts could not be discovered by the legal custodian for several years. The abductor would be denied access to the court of another state under section 8(b) (A.C.A. § 9-13-208(b)) and state 1 would have modification jurisdiction in any event under section 3(a)(4) (A.C.A. § 9-13-203(a)(4)). Compare *Crocker v. Crocker*, 122 Colo. 49, 219 P.2d 311 (1950).

The prior court has jurisdiction to modify under this section even though its original assumption of jurisdiction did not meet the standards of this Act, as long as it would have jurisdiction now, that is, at the time of the petition for modification.

If the state of the prior decree declines to assume jurisdiction to modify the decree, another state with jurisdiction under section 3 (A.C.A. § 9-13-203) can proceed with the case. That is not so if the prior court dismissed the petition on its merits.

Respect for the continuing jurisdiction of another state under this section will serve the purposes of this Act only if the prior court will assume a corresponding obligation to make no changes in the existing custody arrangement which are not required for the good of the child. If the court overturns its own decree in order to discipline a mother or father, with whom the child had lived for years, for failure to

comply with an order of the court, the objective of greater stability of custody decrees is not achieved. See Comment to section 13 (A.C.A. § 9-13-213) last paragraph, and cases there cited. See also *Sharpe v. Sharpe*, 77 Ill. App. 295, 222 N.E.2d 340 (1966). Under section 15 (A.C.A. § 9-13-215) of this Act an order of a court contained in a custody decree can be directly enforced in another state.

Under subsection (b) (A.C.A. § 9-13-214(b)) transcripts of prior proceedings if received under section 22 (A.C.A. § 9-13-222) are to be considered by the modifying court. The purpose is to give the judge the opportunity to be as fully informed as possible before making a custody decision. "One court will seldom have so much of the story that another's inquiry is unimportant" says Paulsen, *Appointment of a Guardian in the Conflict of Laws*, 45 Iowa L. Rev. 212, 226 (1960). See also Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings*, 64 Mich. L. Rev. 1, 6-7 (1965); and Ratner, *Legislative Resolution of the Interstate Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. Cal. L. Rev. 183, 202 (1965). How much consideration is "due" this transcript, whether or under what conditions it is received in evidence, are matters of local, internal law which are not affected by this interstate act.

Comment to Section 15 (A.C.A. § 9-13-215)

Out-of-state custody decrees which are required to be recognized are enforced by other states. See section 13 (A.C.A. § 9-13-213). Subsection (a) (A.C.A. § 9-13-215(a)) provides a simplified and speedy method of enforcement. It is derived from section 2 of the Uniform Enforcement of Foreign Judgments Act of 1964, 9A U.L.A. 486 (1965). A certified copy of the decree is filed in the appropriate court, and the decree thereupon becomes in effect a decree of the state of filing and is enforceable by any method of enforcement available under the law of that state.

The authority to enforce an out-of-state decree does not include the power to modify it. If modification is desired, the petition must be directed to the court which has jurisdiction to modify under section 14 (A.C.A. § 9-13-214). This does not mean that the state of enforcement may not in

an emergency stay enforcement if there is a danger of serious mistreatment of the child. See Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795, 832-33 (1964).

The right to custody for periods of visitation and other provisions of a custody decree are enforceable in other states in the same manner as the primary right to custody. If visitation privileges provided in the decree have become impractical upon moving to another state, the remedy against automatic enforcement in another state is a petition in the proper court to modify visitation arrangements to fit the new conditions.

Subsection (b) (A.C.A. § 9-13-215(b)) makes it clear that the financial burden of enforcement of a custody decree may be shifted to the wrongdoer. Compare 2 *Armstrong*, *California Family Law* 328

(1966 Suppl.), and *Crocker v. Crocker*, 195 F.2d 236 (1952).

Comment to Section 16 (A.C.A. § 9-13-216)

The purpose of this section is to gather all information concerning out-of-state custody cases which reaches a court in one designated place. The term "registry" is derived from section 35 of the Uniform Reciprocal Enforcement of Support Act of 1958, 9C U.L.A. 61 (1967 Suppl.). Another term may be used if desired without af-

fecting the uniformity of the Act. The information in the registry is usually incomplete since it contains only those documents which have been specifically requested or which have otherwise found their way to the state. It is therefore necessary in most cases for the court to seek additional information elsewhere.

Comment to Section 18 (A.C.A. § 9-13-218)

Sections 18 (A.C.A. § 9-13-218) to 22 (A.C.A. § 9-13-222) are derived from sections 3.01 and 3.02 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321, 326 (1966); from ideas underlying the Uniform Reciprocal Enforcement of Support Act; and from Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralittigious Proceedings*, 64 Mich. L. Rev. 1 (1965). They are designed to fill the partial vacuum which inevitably exists in cases involving an "interstate child" since part of the essential information about the child and his relationship to other persons is always in another state. Even though jurisdiction is assumed under sections 3 (A.C.A. § 9-13-203) and 7 (A.C.A. § 9-13-207) in the state where much (or most) of the pertinent facts are readily available,

some important evidence will unavoidably be elsewhere.

Section 18 (A.C.A. § 9-13-218) is derived from portions of section 3.01 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321. The first sentence relates to depositions, written interrogatories and other discovery devices which may be used by parties or representatives of the child. The procedural rules of the state where the device is used are applicable under this sentence. The second sentence empowers the court itself to initiate the gathering of out-of-state evidence which is often not supplied by the parties in order to give the court a complete picture of the child's situation, especially as it relates to a custody claimant who lives in another state.

Comment to Section 19 (A.C.A. § 9-13-219)

Section 19 (A.C.A. § 9-13-219) relates to assistance sought by a court of the forum state from a court of another state. See comment to section 18 (A.C.A. § 9-13-218). Subsection (a) (A.C.A. § 9-13-219(a)) covers any kind of evidentiary procedure available under the law of the assisting state which may aid the court in the requesting state, including custody investigations (social studies) if authorized by the law of the other state. Under

what conditions reports of social studies and other evidence collected under this subsection are admissible in the requesting state, is a matter of internal state law not covered in this interstate statute. Subsection (b) (A.C.A. § 9-13-219(b)) serves to bring parties and the child before the requesting court, backed up by the assisting court's contempt powers. See section 11 (A.C.A. § 9-13-211).

Comment to Section 20 (A.C.A. § 9-13-220)

Section 20 (A.C.A. § 9-13-220) is the counterpart of section 19 (A.C.A. § 9-13-219). It empowers local courts to give help to out-of-state courts in custody cases. See comments to sections 18 (A.C.A. § 9-13-218) and 19 (A.C.A. § 9-13-219). The references to social studies have been placed in brackets so that states without authorization to make social studies outside of

juvenile court proceedings may omit them if they wish. Subsection (b) (A.C.A. § 9-13-220(b)) reaffirms the existing freedom of persons within the United States to give evidence for use in proceedings elsewhere. It is derived from section 3.02 (b) of the Interstate and International Procedure Act, 9B U.L.A. 327 (1966).

Comment to Section 21 (A.C.A. § 9-13-221)

See comments to sections 18 (A.C.A. § 9-13-218) and 19 (A.C.A. § 9-13-219). Documents are to be preserved until the child is old enough that further custody

disputes are unlikely. A lower figure than the ones suggested in the brackets may be inserted.

Comment to Section 22 (A.C.A. § 9-13-222)

This is the counterpart of section 21 (A.C.A. § 9-13-221). See comments to sections 18 (A.C.A. § 9-13-218), 19 (A.C.A.

§ 9-13-219), and 14(b) (A.C.A. § 9-13-214(b)).

Comment to Section 23 (A.C.A. § 9-13-223)

Not all the provisions of the Act lend themselves to direct application in international custody disputes; but the basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives. Compare *Application of Lang*, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959) and *Swindle v. Bradley*, 240 Ark. 903, 403 S.W. 2d 63 (1966).

The first sentence makes the general policies of the Act applicable to international cases. This means that the substance of section 1 (A.C.A. § 9-13-201) and the principles underlying provisions like sections 6 (A.C.A. § 9-13-206), 7 (A.C.A. § 9-13-207), 8 (A.C.A. § 9-13-208), and 14(a) (A.C.A. § 9-13-214(a)), are

to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

The second sentence declares that custody decrees rendered in other nations by appropriate authorities (which may be judicial or administrative tribunals) are recognized and enforced in this country. The only prerequisite is that reasonable notice and opportunity to be heard was given to the persons affected. It is also to be understood that the foreign tribunal had jurisdiction under its own law rather than under section 3 (A.C.A. § 9-13-203) of this Act. Compare *Restatement of the Law Second, Conflict of Laws, Proposed Official Draft*, sections 10, 92, 98, and 109(2) (1967). Compare also *Goodrich, Conflict of Laws* 390-93 (4th ed., Scoles, 1964).

Comment to Section 24 (A.C.A. § 9-13-224)

Judicial time spent in determining which court has or should exercise jurisdiction often prolongs the period of uncertainty and turmoil in a child's life more than is necessary. The need for speedy

adjudication exists, of course, with respect to all aspects of child custody litigation. The priority requirement is limited to jurisdictional questions because an all encompassing priority would be beyond the

scope of this Act. Since some states may have or wish to adopt a statutory provision or court rule of wider scope, this section is placed in brackets and may be omitted.

**UNIFORM RECIPROCAL ENFORCEMENT
OF SUPPORT ACT**

**1968 REVISED ACT
(§ 9-14-301 ET SEQ.)**

Publisher's Notes. This subchapter
was repealed by Acts 1993, No. 468, § 8.

UNIFORM INTERSTATE FAMILY SUPPORT ACT

(A.C.A. § 9-17-101 et seq.)

Prefatory Note

I. BACKGROUND INFORMATION

Congressional legislation in 1975, 1984, and 1988 has had a major impact on state child support enforcement law, both substantive and procedural. Not only did Congress mandate that states adopt child support guidelines, but it also required the states to establish child support enforcement procedures such as wage withholding, tax intercepts, and credit reporting. In addition, federal law has begun to invade the area of substantive rules for child support; for example, the Bradley Amendment, adopted in 1986, prohibits retroactive reduction of a child support arrearage stemming from a court order.

To respond to these new developments, in 1988 the Conference established a Drafting Committee to review the Uniform Reciprocal Enforcement of Support Act (URESA) and its revised version (RURESA), and to adopt revisions to URESA or propose a free-standing act on the subject of child support enforcement. Some version of URESA or RURESA has been adopted in all states and therefore is familiar to people who work in this field. After reviewing the congressional legislation of the 1980's and the Model Interstate Income Withholding Act drafted in 1986 by the American Bar Association and the National Conference of State Legislatures, the Committee originally decided that the interstate aspects of child support enforcement could be adequately addressed through amendments to RURESA.

At the Conference's Annual Meeting in the summer of 1989, the Drafting Com-

mittee presented for first reading some limited initial changes to RURESA. Subsequently, after obtaining the views of numerous persons who are familiar with URESA, the Committee decided to revise the Act much more extensively, and presented those changes for another first reading at the Conference's 1990 Annual Meeting.

Following receipt of extensive comments at the 1990 Annual Meeting and from numerous groups and individuals, the Drafting Committee recommended, and the Executive Committee of the Conference decided, that final approval of the revised URESA should be delayed until the Conference's 1992 Annual Meeting because that timetable would coincide with the work of the U.S. Commission on Interstate Child Support. Throughout 1991 and 1992, the Drafting Committee continued to work on the Act, in conjunction with numerous knowledgeable Advisors and Observers, including five persons who also served as members of the U.S. Commission.

The Drafting Committee and Executive Committee determined that the Act should have a new name — the Uniform Interstate Family Support Act (UIFSA) (§ 9-17-101 et seq.). This new Act (§ 9-17-101 et seq.) is intended to completely revise and replace URESA and RURESA.

A description of the major changes proposed to be made in RURESA presented by UIFSA (§ 9-17-101 et seq.) follows below.

II. PROPOSED CHANGES

A. In General

1. **TERMINOLOGY.** The Terminology of URESA and RURESA has been retained as much as possible to ease the transition to the new act (§ 9-17-101 et seq.), *i.e.*, "responding" and "initiating" state. One notable change is the substitu-

tion of the term "tribunal" for "court," in recognition of the fact that many states have created administrative agencies to establish, enforce, and modify child support.

2. **REORGANIZATION.** The Act (§ 9-17-101 et seq.) has been reorganized into a

more logical and understandable order than found in RURESA. The order in which civil and criminal proceedings are dealt with is reversed, which more accurately reflects the frequency and utility of those approaches. Within civil proceedings, separate articles have been created for provisions common to all types of actions (Article (subchapter) 3); for the establishment of support (Article (subchapter) 4); for the enforcement of a support order of another state without registration (Article (subchapter) 5); for the enforcement and modification of support orders after registration (Article (subchapter) 6); and for the determination of parentage (Article (subchapter) 7). In addition, new jurisdictional provisions (Article (subchapter) 2) establish uniform long-arm jurisdiction over nonresidents in order to facilitate one-state proceedings whenever possible.

3. RECIPROCITY NOT REQUIRED.

Reciprocity of laws between states is no longer required because at present all states have quite similar laws, and the enacting state should enforce a support obligation irrespective of another state's law. Nonetheless, consistent with past practice, URESA, RURESA and all substantially similar state laws are deemed equivalent to UIFSA (§ 9-17-101 et seq.) for purposes of interstate actions (Section 101(7), (16) (§ 9-17-101(7) and (16)). This means that any of these acts can be used if different states have different versions in effect, which should help ease the transition to the new Act (§ 9-17-101 et seq.).

4. LONG-ARM JURISDICTION. The Act (§ 9-17-101 et seq.) contains a broad provision for asserting long-arm jurisdiction to give the tribunals in the home state of the supported family the maximum possible opportunity to secure personal jurisdiction over an absent respondent (Section 201) (§ 9-17-201), thereby converting what otherwise would be a two-state proceeding into a one-state lawsuit. Where jurisdiction over a nonresident is obtained, the tribunal may obtain evidence, provide for discovery, and elicit testimony through use of the "information route" sections of the Act (Sections 202, 316 and 318) (§§ 9-17-202, 9-17-316, and 9-17-318).

B. Establishing a Support Order

1. FAMILY SUPPORT. The revision

makes clear that the Act (§ 9-17-101 et seq.) may be used only for proceedings involving the support of a child or spouse of the support obligor, and not to enforce other duties such as support of a parent (Sections 101(2), (18)) (§ 9-17-101(2) and (18)). Under URESA, child support and spousal support are treated identically. However, under UIFSA (§ 9-17-101 et seq.) spousal support is modifiable in the interstate context only after such a request is forwarded to the original issuing state from another state (Sections 205 and 206) (§§ 9-17-205 and 9-17-206).

2. LOCAL LAW. URESA provides a somewhat complex choice of law for establishment of duties of support, *i.e.*, the law of the state where the obligor was present for the period during which support is sought. Otherwise that Act generally refers to the law of the forum. The new Act (§ 9-17-101 et seq.) provides that the procedures and law of the forum apply, with some significant additions or exceptions:

(a) Certain procedures are prescribed for interstate cases even if they are not consistent with local law, *e.g.*, the contents of interstate petitions (Sections 311 and 602) (§§ 9-17-311 and 9-17-602); the nondisclosure of certain sensitive information (Section 312) (§ 9-17-312); authority to award fees and costs including attorneys fees (Section 313) (§ 9-17-313); elimination of certain testimonial immunities (Section 314) (§ 9-17-314); and limits on the assertion of nonparentage as a defense to support enforcement (Section 315) (§ 9-17-315).

(b) Visitation issues cannot be raised in child support proceedings (Section 305(d)) (§ 9-17-305(d)).

(c) Special rules for the interstate transmission of evidence and discovery are added to help place the maximum amount of information before the deciding tribunal. These procedures are available even in one-state cases in which the tribunal asserts long-arm jurisdiction over a nonresident (Sections 202, 316, and 318) (§§ 9-17-202, 9-17-316, and 9-17-318).

(d) The choice of law for the interpretation of registered orders is that of the state issuing the underlying support order. If there are different statutes of limitation for enforcement, however, the longer one applies (Section 604) (§ 9-17-604).

3. ONE-ORDER SYSTEM. Under the

present URESA, the majority of support proceedings are *de novo*. Even when an existing order of one state is "registered" in a second state, the registering state often asserts the right to modify the registered order. This means that more than one valid support order can be in effect in more than one state. Under UIFSA (§ 9-17-101 et seq.), the principle of continuing, exclusive jurisdiction is introduced into the Act (§ 9-17-101 et seq.) for the first time; this aims, so far as possible, to allow only one support order to be effective at any one time. This principle is carried out in Sections 204 (rules for resolving actions pending in two or more states); 205 and 206 (rules for determining which tribunal has continuing, exclusive jurisdiction over an order); 207 (reconciliation with orders issued before the effective date of the Act (§ 9-17-101 et seq.)); and 208 (multiple orders for two or more families supported by the same obligor) (§§ 9-17-204, 9-17-205, 9-17-206, 9-17-207, and 9-17-208).

4. **EFFICIENCY.** A number of improvements are made to the former Act to streamline interstate proceedings:

(a) Proceedings may be initiated by or referred to administrative agencies rather than to courts in those states that use those agencies to establish support orders (Section 101(22)) (§ 9-17-101(22)).

(b) Initiation of an interstate case in the initiating state is expressly made ministerial rather than a matter of court adjudication or review. Further, a party in the initiating state may file an action directly in the responding state (Section 301(c)) (§ 9-17-301(c)).

(c) Forms which are federally mandated for use in certain interstate cases must be used in all interstate cases for transmission of information from the initiating to the responding state (Section 311(b)) (§ 9-17-311(b)), and the information in those forms is declared to be admissible evidence (Section 316(b)) (§ 9-17-316(b)).

(d) Authority is provided for the transmission of information and documents through electronic and other modern means of communication (Section 316(e)) (§ 9-17-316(e)).

(e) A tribunal may permit an out-of-state party or witness to be deposed or to testify by telephone conference (Section 316(f)) (§ 9-17-316(f)).

(f) Tribunals are required to cooperate in the discovery process for use in a tribunal in another state (Section 318) (§ 9-17-318).

(g) A tribunal and a support enforcement agency providing services to a supported family must keep the parties informed about all important developments in a case (Sections 305 and 307) (§§ 9-17-305 and 9-17-307).

(h) A registered support order is confirmed and immediately enforceable unless the respondent files a written objection within 20 days after service and sustains that objection (Section 603 and 607) (§§ 9-17-603 and 9-17-607).

5. **PRIVATE ATTORNEYS.** In support actions the Act (§ 9-17-101 et seq.) explicitly authorizes parties to retain private legal counsel (Section 309) (§ 9-17-309), as well as to use the services of state support enforcement agency (Section 307(a)) (§ 9-17-307(a)). It (§ 9-17-101 et seq.) expressly takes no position on whether the support enforcement agency assisting a supported family establishes an attorney-client relationship with the applicant (Section 307(c)) (§ 9-17-307(c)).

6. **INTERSTATE PARENTAGE.** UIFSA (§ 9-17-101 et seq.) clearly authorizes establishment of parentage in an interstate proceeding, even if not coupled with a proceeding to establish support (Section 701) (§ 9-17-701).

C. Enforcing a Support Order

1. **DIRECT ENFORCEMENT.** The Act (§ 9-17-101 et seq.) provides two direct enforcement procedures that do not require assistance from a tribunal. First, the support order may be mailed directly to an obligor's employer in another state (Section 501) (§ 9-17-501), which triggers wage withholding by that employer without the necessity of a hearing unless the employee objects. Second, the Act (§ 9-17-101 et seq.) provides for direct administrative enforcement by the support enforcement agency of the obligor's state (Section 502) (§ 9-17-502).

2. **REGISTRATION.** The registration process of the Act (§ 9-17-101 et seq.) is modeled after that procedure originated in RURESA, but is far more comprehensive. All judicial enforcement activity must begin with the registration of the existing support order in the responding state (Sections 601-604) (§§ 9-17-601 —

9-17-604). However, the registered order continues to be the order of the issuing state, and the role of the responding state is limited to enforcing that order except in the very limited circumstances where modification is permitted (Sections 605-608)(§§ 9-17-605 — 9-17-608).

D. Modifying a Support Order

1. **REGISTRATION.** A party (whether obligor or obligee) seeking to modify an existing child support order is directed to follow the identical procedure for registration as when enforcement is sought. Any combination sequence is allowable, *e.g.*, registration for enforcement and later modification, or, contemporaneous modification and enforcement.

2. **MODIFICATION LIMITED.** Under RURESA most courts have held that a responding state can modify a support order for which enforcement has been sought. Except under narrowly defined fact circumstances, under the new Act (§ 9-17-101 et seq.) the only tribunal that can modify a support order is the one

having continuing, exclusive jurisdiction over the order. If the parties no longer reside in the issuing state, a tribunal with personal jurisdiction over both parties or with power given by agreement of the parties, has jurisdiction to modify (Sections 205, 206, 603(c), 609-612) (§§ 9-17-205, 9-17-206, 9-17-603(c), and 9-17-609 — 9-17-612).

E. Parentage

It is not entirely clear whether RURESA provides for an interstate determination of parentage without also seeking establishment of support. UIFSA (§ 9-17-101 et seq.) clearly states that interstate determination of parentage is authorized. It may be accomplished without an accompanying establishment of support, or in a contemporaneous manner to both determine parentage and establish support. The Act (§ 9-17-101 et seq.) provides no substantive or procedural alterations to the existing law of the forum with regard to determination of parentage.

Comment to Section 101 (A.C.A. § 9-17-101)

Several additional terms are defined in this section (§ 9-17-101) as compared to the parallel RURESA § 2, which has fourteen entries. Many crucial definitions continue to be left to local law. For example, the definitions of “child” and “child support order” provided by Subsections (1) and (2) (§ 9-17-101(1) and (2)) refer to “the age of majority” without further elaboration. The exact age at which a child becomes an adult for different purposes is a matter for the law of each state, as is the age at which a parent’s duty to furnish child support terminates. Similarly, a wide variety of other terms of art are implicitly left to state law. For example, Subsection (21) (§ 9-17-101(21)) refers *inter alia* to “health care, arrearages, or reimbursement . . .” All of these terms are subject to individualized definitions on a state-by-state basis.

Subsection (3) (§ 9-17-101(3)) defines “duty of support” to mean the legal obligation to provide support before it has been reduced to judgment. It is broadly defined to include both prospective and retrospective obligations, to the extent they are imposed by the relevant state law.

In order to resolve certain conflicts in

the exercise of jurisdiction, for limited purposes Subsection (4) (§ 9-17-101(4)) borrows the concept of the “home state” of a child from the Uniform Child Custody Jurisdiction Act (§ 9-13-201 et seq.), versions of which have been adopted in all 50 states, and from the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A.

Subsection (6) (§ 9-17-101(6)) is written broadly so that states that direct income withholding by an obligor’s employer based on “other legal process,” as distinguished from an order of a tribunal, may have that “legal process” recognized as an “income withholding order.” Federal law requires that each state provide for income withholding “without the necessity of any application therefor . . . or for any further action . . . by the court or other entity which issued such order.” 42 U.S.C. 666(b) (2). States have complied with this directive in a variety of ways. For example, New York provides a method for obtaining income withholding of court-ordered support by authorizing an attorney, clerk of court, sheriff or agent of the child support enforcement agency to serve upon the defaulting obligor’s employer an “in-

come execution for support enforcement." New York McKinney's C.P.L.R. 5241. This "other legal process" reportedly is the standard method for obtaining income withholding in that state, while the statutory provision for an income withholding order, C.P.L.R. 5242, is rarely used by either the courts or the litigants.

Subsections (7) and (8) (§ 9-17-101(7) and (8)) define "initiating state" and "initiating tribunal" similarly to RURESA § 2(d). It is important to note, however, that this Act (§ 9-17-101 et seq.) permits the direct filing of an interstate action in the responding state without an initial filing in an initiating tribunal. Thus, a petitioner in one state could seek to establish a support order in a second state by either filing in the second state's tribunal or seeking the assistance of the support enforcement agency in the second state.

The term "obligee" in Subsection (12) (§ 9-17-101(12)) is defined in a broad manner similar to RURESA § 2(f), which is consistent with common usage. In instances of spousal support, the person owed the duty of support and the person receiving the payments are almost always the same. Use of the term is more complicated in the context of a child support order. The child is the person to whom the duty of support is owed and therefore can be viewed as the ultimate obligee. However, "obligee" usually refers to the individual receiving the payments. While this is most commonly the custodial parent or other legal custodian, the "obligee" may be a support enforcement agency which has been assigned the right to receive support payments in order to recoup AFDC (Aid to Families with Dependent Children, 42 U.S.C. § 601 et seq.). Even in the absence of such an assignment, a state may have an independent statutory claim for reimbursement for general assistance provided to a spouse, a former spouse, or a child of an obligor. The Act (§ 9-17-101 et seq.) also uses "obligee" to identify an individual who is asserting a claim for support, not just for a person whose right to support is unquestioned, presumed, or has been established in a legal action. Subsection (13) (§ 9-17-101(13)) provides the correlative definition of an "obligor," which includes an individual who is alleged to owe a duty of support as well as a person whose obligation has previously been determined.

Note that the definitions of "responding state" and "responding tribunal" in Subsections (16) and (17) (§ 9-17-101(16) and (17)) accommodate the direct filing of a petition under this Act (§ 9-17-101 et seq.) without the intervention of an initiating tribunal. Both definitions acknowledge the possibility that there might be a responding state or tribunal in a situation where there is no initiating state or tribunal.

Subsection (19) (§ 9-17-101(19)) withdraws the requirement of reciprocity demanded by RURESA and URESA. A state need not enact UIFSA (§ 9-17-101 et seq.) in order for support orders issued by its tribunal to be enforced by other states. Public policy favoring such enforcement is sufficiently strong to warrant waiving any *quid pro quo* among the states. This policy extends to foreign jurisdictions, as well, which is intended to facilitate establishment and enforcement of orders from those jurisdictions. Specifically, if a support order from a Canadian province or Mexican state conforms to the principles of UIFSA (§ 9-17-101 et seq.), that order should be honored when it crosses the border in a spirit of comity.

Subsection (21) (§ 9-17-101(20)), "Support Enforcement Agency," includes the state IV-D agency (Part IV-D, Social Security Act, 42 U.S.C. § 651 et seq.), and other state or local governmental entities charged with establishing or enforcing support.

Subsection (22) (§ 9-17-101(22)) introduces a completely new term, "tribunal," which replaces the term "court" used in RURESA. With the advent of the federal IV-D program, a number of states have delegated various aspects of child support establishment and enforcement to quasi-judicial bodies and administrative agencies. UIFSA (§ 9-17-101 et seq.) adopts the term "tribunal" to account for the breadth of state variations in dealing with support orders.

Throughout the Act (§ 9-17-101 et seq.) the term refers to a tribunal of the enacting state unless expressly noted otherwise. To avoid confusion, however, when actions of tribunals of the enacting state and another state are contrasted in the same section or subsection, the phrases "tribunal of this State" and "tribunal of another state" are used for the sake of clarity.

Comment to Section 102 (A.C.A. § 9-17-102)

The enacting state must identify the courts, administrative agencies, or the combination of those entities, which constitute the tribunal authorized to deal with family support. In a particular state there may be several different such enti-

ties authorized to determine family support matters. It should be emphasized that this provision (§ 9-17-102) is not designed to address questions of venue, which are left to otherwise applicable state law.

Comment to Section 103 (A.C.A. § 9-17-103)

The existence of procedures for interstate establishment, enforcement, or modification of support or a determination of parentage in this Act (§ 9-17-101 et seq.) does not preclude the application of general state law. For example, a petitioner

may decide to file an action directly in the state of residence of the respondent under the generally applicable support law, thereby submitting to the personal jurisdiction of that forum, and forego reliance on the Act (§ 9-17-101 et seq.).

Comment to Section 201 (A.C.A. § 9-17-201)

Part A of Article (subchapter) 2 asserts what is commonly described as long-arm jurisdiction over a nonresident respondent for purposes of establishing a support order or determining parentage. Inclusion of this long-arm provision in this interstate Act (§ 9-17-101 et seq.) is justified because even though the law of only the forum state is applicable, residents of two separate states are involved in the litigation and subject to the personal jurisdiction of the forum. The intent is to insure that every enacting state has a long-arm statute as broad as constitutionally permitted. In situations where the long-arm statute can be satisfied, the petitioner (either the obligor or the obligee) has two options under the Act (§ 9-17-101 et seq.): (1) utilize the long-arm statute to obtain personal jurisdiction over the respondent; or (2) initiate a two-state action under the succeeding provisions of UIFSA (§ 9-17-101 et seq.) seeking to establish a support order in the respondent's state of residence.

Although not expressly stated, the long-arm statute provided by this section (§ 9-17-201) may be applied to spousal support as well as to child support. However, almost all of the specific provisions relate to child support orders or determinations of parentage. Only Subsections (1), (2) and (8) (§ 9-17-201(1), (2), and (8)) are applicable to an action for spousal support asserting long-arm jurisdiction over a nonresident. The first two subsections (§ 9-17-201(1) and (2)) are wholly noncon-

troversial insofar as an assertion of personal jurisdiction is concerned. This accords with the fact that very few states have chosen to enact specific domestic relations long-arm statutes and that the focus of UIFSA (§ 9-17-101 et seq.) is primarily on child support. Moreover, assertion of personal jurisdiction under Subsections (1), (2), or (8) (§ 9-17-201(1), (2), or (8)) will doubtless yield jurisdiction over all matters to be decided between the spouses, including division of property on divorce. Thus, the most obvious basis for asserting long-arm jurisdiction over spousal support, i.e., "last matrimonial domicile," is not included in Section 201 (§ 9-17-201) to avoid the potential problem of another instance of bifurcated jurisdiction. That is, a situation in which a tribunal could order a nonresident to pay spousal support, while not being authorized to personally bind that nonresident to a division of property on divorce.

Under RURESА, multiple support orders affecting the same parties are commonplace. UIFSA (§ 9-17-101 et seq.) creates a structure designed to provide for only one support order at a time. This one order regime is facilitated and combined with a broad assertion of personal jurisdiction under this long-arm provision (§ 9-17-201). The frequency of a two-state procedure involving the participation of tribunals in both states should be substantially reduced by the introduction of this long-arm statute (§ 9-17-201).

Subsection (1) (§ 9-17-201(1)) codifies

the holding of *Burnham v. Superior Court*, 495 U.S. 604 (1990), which reaffirms the constitutional validity of asserting personal jurisdiction based on personal service within a state. Subsection (2) (§ 9-17-201(2)) expresses the principle that a nonresident party concedes personal jurisdiction by seeking affirmative relief or by submitting to the jurisdiction by answering or entering an appearance. However, the power to assert jurisdiction over support issues under the Act (§ 9-17-101 et seq.) does not extend the tribunal's jurisdiction to other matters. Subsections (1) through (8) (§ 9-17-201(1) — (8)) are derived from a variety of sources, including the Uniform Parentage Act § 8, Texas Family Code § 11.051 (Vernon Supp. 1992), and New York Family Court Act

§ 154. Subsection (7) (§ 9-17-201(7)) is bracketed because not all states maintain putative father registries. The factual situations catalogues in these subsections are appropriate and constitutionally acceptable grounds upon which to exercise personal jurisdiction over an individual.

Subsection (8) (§ 9-17-201(8)) tracks the broad, catch-all provisions found in many state statutes, including California, Civ. P. Code § 410.10 (1973); New York, *supra*; and Texas, *supra*. It should be noted, however, that this provision (§ 9-17-201(8)), standing alone, was found to be inadequate to sustain a child support order under the facts presented in *Kulko v. Superior Court of California for San Francisco*, 436 U.S. 84 (1978).

Comment to Section 202 (A.C.A. § 9-17-202)

Assertion of long-arm jurisdiction over a nonresident essentially results in a one-state proceeding, notwithstanding the fact that the parties reside in different states. With two exceptions, the provisions of UIFSA (§ 9-17-101 et seq.) are not applicable in these proceedings. The first exception allows the tribunal to apply the special rules of evidence and procedure of Section 316 (§ 9-17-316) in order to facilitate decision-making when one party resides in another state, even though that party is subject to the personal jurisdiction of the tribunal. In other words, the one-state case may utilize two-state procedures in the interests of economy, efficiency, and fair play. The same consider-

ations account for the second exception; the two-state discovery procedures of Section 318 (§ 9-17-318) are made applicable to a one-state proceeding when a foreign tribunal can assist in that process. In all other situations, the substantive and procedural law of the state applies. However, to facilitate interstate exchange of information and to enable the nonresident to participate as fully as possible in the proceedings without the necessity of personally appearing in the forum state, this section expressly incorporates the special UIFSA (§ 9-17-101 et seq.) rules on evidence and assistance with discovery procedures to long-arm cases.

Comment to Section 203 (A.C.A. § 9-17-203)

Part B of Article (subchapter) 2 (§§ 9-17-203 — 9-17-206) tracks the traditional RURESA action, involving residents of separate states. In this situation, the initiating state does not assert personal jurisdiction over the nonresident, but instead forwards the case to another, responding state, which is to assert personal jurisdiction over its resident.

This section (§ 9-17-203) identifies the

roles a tribunal of the forum may serve; as appropriate, it may act as either an initiating or a responding tribunal under UIFSA (§ 9-17-101 et seq.). Note that a tribunal can serve as a responding tribunal when there is no initiating tribunal in another state. This is to accommodate the direct filing of an action in a responding tribunal by a nonresident.

Comment to Section 204 (A.C.A. § 9-17-204)

This section is similar to Section 6 of the Uniform Child Custody Jurisdiction Act

(§ 9-13-206). Under the one-order system established by UIFSA (§ 9-17-101 et seq.),

it is necessary to provide a new procedure in order to eliminate the multiple orders so common under RURESA and URESA. This requires cooperation between, and deference by, sister-state tribunals in order to avoid issuance of competing support orders. To this end, tribunals are expected to take an active part in seeking out information about support proceedings in other states concerning the same child. Depending on the circumstances, one or the other of two tribunals considering the same support obligation should decide to defer to the other. In this regard, UIFSA (§ 9-17-101 et seq.) makes a significant departure from the approach adopted by

the UCCJA (§ 9-13-201 et seq.), which chooses “first filing” as the method for resolving competing jurisdictional disputes. In the analogous situation, the federal Parental Kidnapping Prevention Act chooses the home state of the child to establish priority. Given the preemptive nature of the PKPA and the likelihood that custody and support are both involved in most cases, UIFSA (§ 9-17-101 et seq.) opts for the federal method of resolving disputes between competing jurisdictional assertions by establishing a priority for the tribunal in the child’s home state. If there is no home state, “first filing” controls.

Comment to Section 205 (A.C.A. § 9-17-205)

This section (§ 9-17-205) is perhaps the most crucial provision in UIFSA (§ 9-17-101 et seq.). It (§ 9-17-205) establishes the principle that the issuing tribunal retains continuing, exclusive jurisdiction over the support order except in very narrowly defined circumstances. If all parties and the child reside elsewhere, the issuing state loses its continuing, exclusive jurisdiction—which in practical terms means the issuing tribunal loses its authority to modify its order. The issuing state no longer has a nexus with the parties or child and, furthermore, the issuing tribunal has no current information about the circumstances of anyone involved. Note, however, that the one-order of the issuing tribunal remains valid and enforceable. That order is in effect not only in the issuing state and those states in which the order has been registered, but also may be enforced in additional states in which the one-order is registered for enforcement after the issuing state loses its power to modify the original order, see Sections 601-604 (§§ 9-17-601 — 9-17-604) (Registration and Enforcement of Support Order), *infra*. The one-order remains in effect until it is properly modified in accordance with the narrow terms of the Act (§ 9-17-101 et seq.), see Sections 609-612 (§§ 9-17-609 — 9-17-612) (Registration and Modification of Child Support Order), *infra*.

Child support orders may be modified under certain, specific conditions: (1) on the agreement of both parties; or, (2) if all the relevant persons, that is, the obligor,

the individual obligee, and the child, have permanently left the issuing state. Note that while Subsection (b)(2) (§ 9-17-205(b)(2)) identifies the method for the release of continuing, exclusive jurisdiction by the issuing tribunal, it (§ 9-17-205(b)(2)) does not confer jurisdiction to modify on another tribunal. Modification requires that a tribunal have personal jurisdiction over both parties, as provided in Article (subchapter) 6, Part C (§§ 9-17-609 — 9-17-612). It should also be noted that nothing in this section (§ 9-17-205) is intended to deprive a court which has lost continuing, exclusive jurisdiction of the power to enforce arrearages which have accrued during the existence of a valid order.

With regard to spousal support, the issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation. The prohibition against a modification of an existing spousal support order of another state imposed by Sections 205 and 206 (§§ 9-17-205 and 9-17-206) marks a radical departure from RURESA, which treats spousal and child support orders identically. Under UIFSA (§ 9-17-101 et seq.), modification of spousal support is permitted in the interstate context only if an action is initiated outside of, and modified by the original issuing state. While UIFSA (§ 9-17-101 et seq.) revises RURESA in this regard, in fact this will have a minimal effect on actual practice. Interstate modification of spousal support has been relatively rare

under RURESA. Moreover, the prohibition of modification of spousal support is consistent with the basic principle that a tribunal should apply local law if at all possible to insure efficient handling of cases and to minimize choice of law problems. Avoiding conflict of law problems is almost impossible if spousal support orders are subject to modification in a second state. For example, there is wide variation among state laws on the effect on a spousal support order following the obligee's remarriage or nonmarital cohabitation with another person.

The distinction between spousal and

child support is further justified because the standards for modification of child support and spousal support are so different. In most jurisdictions a dramatic improvement in the obligor's economic circumstances will have little or no relevance in an action seeking an upward modification of spousal support, while a similar change in an obligor's situation typically is a primary basis for an increase in child support. This disparity is founded on a policy choice that post-divorce success should benefit the obligor's child, but not an ex-spouse.

Comment to Section 206 (A.C.A. § 9-17-206)

This section (§ 9-17-206) is the correlative of the continuing, exclusive jurisdiction asserted in the preceding section (§ 9-17-205). In Subsection (a) (§ 9-17-206(a)) the enacting state recognizes the continuing, exclusive jurisdiction of other tribunals over support orders and authorizes the initiation of requests for modification to the issuing state.

Subsection (b) (§ 9-17-206(b)) confirms

the power to modify a child support order of the issuing state, provided it retains a sufficient nexus with its order. UIFSA (§ 9-17-101 et seq.) defines that nexus as any situation in which the child or at least one of the parties continues to reside in the issuing state.

Subsection (c) (§ 9-17-206(c)) directs tribunals of the enacting state to adhere to the one-order-at-a-time system.

Comment to Section 207 (A.C.A. § 9-17-207)

This section (§ 9-17-207) establishes a priority scheme for recognition and enforcement of existing multiple orders regarding the same obligor, obligee or obligees, and the same child. Even assuming universal enactment of UIFSA (§ 9-17-101 et seq.), many years will pass before its one-order system will be completely in place. Part C (§§ 9-17-207 — 9-17-209) is designed to span the gulf between the one-order system and the multiple order system in place under RURESA. If only one order has been issued, it is to be treated as if it had been issued under UIFSA (§ 9-17-101 et seq.) if it was issued under a statute which is consistent with the principles of UIFSA (§ 9-17-101 et seq.). But, multiple orders issued under RURESA number in the tens of thousands; it can be reasonably anticipated that those orders, covering the same

parties and child, will continue in effect far into the future.

Assuming multiple orders exist, none of which can be distinguished as being in conflict with the principles of UIFSA (§ 9-17-101 et seq.), an order issued by a tribunal of the child's home state is given the higher priority. If more than one of these orders exists, priority is given to the order most recently issued. If none of the priorities apply, the forum tribunal is directed to issue a new order. Note, however, that multiple orders issued by different states may be entitled to full faith and credit. While this section (§ 9-17-207) cannot and does not attempt to interfere with that constitutional directive with regard to accrued arrearages, it (§ 9-17-207) may and does establish a system for prospective enforcement of competing orders.

Comment to Section 208 (A.C.A. § 9-17-208)

Multiple orders may involve two or more families of the same obligor. Al-

though all such orders are entitled to future enforcement, practical difficulties

are often presented. For example, full enforcement of all orders may exceed the maximum allowed for income withholding, i.e., the federal statute, 42 U.S.C. 666(b) (1), requires that states cap the maximum to be withheld in accordance with the federal consumer credit code limitations on wage garnishment, 15 U.S.C. 1673(b). In order to allocate resources

between competing families, the Act (§ 9-17-101 et seq.) refers to state law. The basic principle is that one or more foreign orders for the support of the obligor's families are of equal dignity and should be treated as if all of the multiple orders had been issued by a tribunal of the forum state.

Comment to Section 209 (A.C.A. § 9-17-209)

This section (§ 9-17-209) is derived from RURESA § 31 (Application of Payments). Because of the multiple orders possible under RURESA, that section was primarily concerned with insuring that payments made on one order were credited towards the amounts due on other orders. For example, full payment of \$300 on an order of State C earned pro tanto discharge of that amount on a \$200 order of State A and a \$400 order of State B.

Under the one-order system of UIFSA (§ 9-17-101 et seq.), the obligor will be ordered to pay only one sum-certain amount; the issuing tribunal should control the methods employed to account for payment of that order from multiple sources of enforcement. Until that scheme is fully in place, however, it is necessary to continue to mandate pro tanto credit for actual payments made against all existing orders.

Comment to Section 301 (A.C.A. § 9-17-301)

This section (§ 9-17-301) is a "road map" of the types of actions authorized by UIFSA (§ 9-17-101 et seq.). Although such a section may be unusual for a uniform act, it is especially justified in this instance because the majority of those persons administering the Act (§ 9-17-101 et seq.) are not attorneys and will doubtless find such assistance to be useful.

Subsection (a) (§ 9-17-301(a)) mandates application of the general provisions of this article (subchapter) to all UIFSA (§ 9-17-101 et seq.) actions.

Generally, Subsection (b) (§ 9-17-301(b)) identifies the fact that orders for spousal support and child support are to

be dealt with identically under the Act (§ 9-17-101 et seq.). However, Subsection (b)(5) (§ 9-17-301(b)(5)) announces that the modification provisions are limited to child support orders; the Act (§ 9-17-101 et seq.) does not provide for a second state to modify a spousal support order.

Subsection (c) (§ 9-17-301(c)) establishes the basic two-state procedure contemplated by the Act (§ 9-17-101 et seq.). The initiating responding procedure is derived from the two-state procedure under RURESA; the direct filing by either an individual or a support enforcement agency is new to this Act (§ 9-17-101 et seq.).

Comment to Section 302 (A.C.A. § 9-17-302)

This section (§ 9-17-302) is derived from RURESA § 13. A minor parent may maintain an action under UIFSA (§ 9-17-101 et seq.) without the appointment of a guardian ad litem, even if the law of the

jurisdiction requires a guardian for an in-state case. If a guardian or legal representative has been appointed, however, he or she may act on behalf of the minor's child in seeking support.

Comment to Section 303 (A.C.A. § 9-17-303)

Historically states have insisted on application of forum law to support cases

whenever possible. A key principle of UIFSA (§ 9-17-101 et seq.) is that a tribu-

nal will have the same powers in an action involving interstate parties as it has in an intrastate case. This inevitably means that the Act (§ 9-17-101 et seq.) is not self-contained; rather, it is supplemented by the support law of the forum. To insure

the efficient processing of the huge number of interstate support cases, it is vital that decisionmakers apply familiar rules of substantive and procedural law to those cases.

Comment to Section 304 (A.C.A. § 9-17-304)

Under RURESA § 14, the initiating tribunal is required to make a preliminary finding of the existence of a support obligation, but in fact, observance of this obligation is erratic across the nation. Under UIFSA (§ 9-17-101 et seq.), by con-

trast, the role of the initiating tribunal consists merely of the ministerial function of forwarding the documents. See *Mossburq v. Coffman*, 6 Kan. App. 2d 428, 629 P.2d 745 (1981); *Neff v. Johnson*, 391 S.W.2d 760 (Tex. Civ. App. 1965).

Comment to Section 305 (A.C.A. § 9-17-305)

This section (§ 9-17-305) revises RURESA §§ 9, 18, 19, 24, 25 and 26. It contains both mechanical functions, such as those in Subsection (a) (§ 9-17-305(a)); judicial functions, as in Subsection (b) (§ 9-17-305(b)), and substantive rules applicable to interstate cases, Subsections (c)-(e) (§ 9-17-305(c)-(e)). For example, Subsection (b) (§ 9-17-305(b)) supplies much more detail than RURESA §§ 24 and 26 to make explicit the wide range of specific powers of the responding tribunal. Because a responding tribunal may be an administrative agency rather than a court, the Act (§ 9-17-101 et seq.) explicitly states that a tribunal is not granted powers that it does not otherwise possess under state law. For example, often authority to enforce orders by contempt is limited to courts.

Subsection (b)(7) (§ 9-17-305(b)(7)) purposefully avoids mention of the priority of liens issued under UIFSA (§ 9-17-101 et seq.). As is generally true under the Act (§ 9-17-101 et seq.), that priority will be determined by the otherwise applicable state law concerning support liens.

Subsection (b)(9) (§ 9-17-305(b)(9)) replaces RURESA § 16 (Jurisdiction By Arrest), which authorizes the responding tribunal "to-obtain the body of the obligor" if

the tribunal "believes that the obligor may flee" Under UIFSA (§ 9-17-101 et seq.), the physical seizure of an obligor is left to the procedures available under state law in other civil cases.

Subsection (c) (§ 9-17-305(c)) clarifies that calculation sheets are to be included with the order in conjunction with the application of support guidelines. Local law generally requires that variation from the child support guidelines must be explained, see 42 U.S.C. § 667; this requirement is extended to all interstate cases.

Under Subsection (d) (§ 9-17-305(d)), an interstate support order may not be conditioned on compliance with a visitation order. While this may be at variance from state law governing intrastate cases, under a UIFSA (§ 9-17-101 et seq.) action the petitioner generally is not present in the tribunal. This distinction justifies prohibiting visitation issues from being litigated in the context of a support proceeding.

Subsection (e) (§ 9-17-305(e)) introduces the policy determination that the petitioner, the respondent, and the initiating tribunal, if any, shall be kept informed about actions taken by the responding tribunal. First class mail is sufficient for this purpose.

Comment to Section 306 (A.C.A. § 9-17-306)

This section (§ 9-17-306) directs a tribunal that receives UIFSA (§ 9-17-101 et seq.) documents in error to forward them to the appropriate tribunal, whether located in the enacting state or elsewhere.

This section (§ 9-17-306) is intended to apply both to initiating and responding tribunals which receive petitions which should be sent to other tribunals. Thus, if a tribunal is inappropriately designated

as the initiating tribunal it shall forward the petition to the appropriate initiating tribunal either in the enacting state or elsewhere. Likewise, if a tribunal is inap-

propriate as the responding tribunal it shall forward the petition to the appropriate responding tribunal either in the enacting state or elsewhere.

Comment to Section 307 (A.C.A. § 9-17-307)

This section (§ 9-17-307) is derived from RURESA §§ 12, 18, and 19.

Subsection (a) (§ 9-17-307(a)) changes the focus of RURESA § 12 (Officials to Represent Obligee) from representation of an obligee to providing services to a [petitioner]. Care should be exercised in the use of terminology given this substantial alteration of past practice under RURESA. Not only may either the obligee or the obligor request services, but that request may be in the context of the establishment of an order, enforcement or review of an existing order, or a modification of that order (upwards or downwards). Thus, those states that use the term "petitioner" to refer to the "plaintiff"

or "complainant" in the original caption of the case may wish to substitute the term "movant" in proceedings initiated after the establishment of a support order.

Subsection (b) (§ 9-17-307(b)) responds to the complaint of many RURESA petitioners that they are not properly kept informed about the progress of their requests for services.

Subsection (c) (§ 9-17-307(c)) neither creates nor rejects the establishment of an attorney-client or fiduciary relationship between the support enforcement agency and a petitioner receiving services from that agency. This controversial issue is left to otherwise applicable state law.

Comment to Section 308 (A.C.A. § 9-17-308)

This section (§ 9-17-308) continues the principle of RURESA § 18(c), under which the Attorney General of the State, or an alternative designated by the individual state statute, is given oversight

responsibility for the diligent provision of services by the support enforcement agency and the power to seek compliance with the Act (§ 9-17-101 et seq.).

Comment to Section 309 (A.C.A. § 9-17-309)

The right of a party to retain private counsel in an action to be brought under UIFSA (§ 9-17-101 et seq.) is explicitly

recognized. RURESA's failure to clearly recognize that power has led to some confusion and inconsistent decisions.

Comment to Section 310 (A.C.A. § 9-17-310)

This section (§ 9-17-310), based on RURESA § 17 (State Information Agency), continues the information-gathering duties of the central agency.

Subsection (b)(4) (§ 9-17-310(b)(4)) does not provide independent access to the information sources or to the governmental

documents listed. Because states have different requirements and limitations concerning such access based on differing views of the privacy interests of individual citizens, the agency is directed to use all lawful means under the relevant state law to obtain and disseminate information.

Comment to Section 311 (A.C.A. § 9-17-311)

This section (§ 9-17-311) is derived from RURESA § 11; it (§ 9-17-311) establishes the basic requirements for the drafting and filing of interstate pleadings and should be read in conjunction with

§ 312 (§ 9-17-312), which provides for the confidentiality of certain information if disclosure is likely to result in harm to a party or a child.

Subsection (b) (§ 9-17-311(b)) provides

authorization for the use of the federally authorized forms promulgated in connection with the IV-D child support enforcement program and mandates substantial compliance with those forms. Although the use of other forms is not prohibited,

statutory preapproval of forms that substantially conform to those mandated by federal law will help to standardize documents, with a concomitant improvement in the efficient processing of UIFSA (§ 9-17-101 et seq.) actions.

Comment to Section 312 (A.C.A. § 9-17-312)

Public awareness of and sensitivity to the dangers of domestic violence has significantly increased since the promulgation of RURESА. This section (§ 9-17-312) authorizes confidentiality in instances where there is a serious risk of domestic violence or child abduction. Although local law generally governs the conduct of the forum tribunal, state law may not provide for maintaining secrecy

about the exact whereabouts of a litigant or other information ordinarily required to be disclosed under state law, e.g., Social Security number of the parties or the child. If so, this provision (§ 9-17-312) creates a confidentiality provision which is particularly appropriate in the light of the intractable problems associated with interstate (as opposed to intrastate) kidnapping.

Comment to Section 313 (A.C.A. § 9-17-313)

This section (§ 9-17-313) is derived from RURESА § 15 (Costs and Fees), which authorizes fees and costs to be assessed against "the obligor." In recognition of the fact that under UIFSA (§ 9-17-101 et seq.) either the obligor or the obligee may file suit, Subsection (a) (§ 9-17-313(a)) permits either to file without payment of a filing fee or other costs. Subsection (b) (§ 9-17-313(b)), however,

continues the RURESА rule that only the support obligor may be assessed the specified costs and fees.

Subsection (c) (§ 9-17-313(c)) provides a sanction to deal with a frivolous contest regarding compliance with an interstate withholding order, registration of a support order, or comparable delaying tactics regarding an appropriate enforcement remedy.

Comment to Section 314 (A.C.A. § 9-17-314)

This section (§ 9-17-314) significantly expands RURESА § 32. Under Subsection (a) (§ 9-17-314(a)), direct or indirect participation in a UIFSA (§ 9-17-101 et seq.) proceeding does not subject a petitioner to an assertion of personal jurisdiction over the petitioner by the forum state in other litigation between the parties. A petition for affirmative relief under UIFSA (§ 9-17-101 et seq.) limits the jurisdiction of the tribunal to the boundaries of the support proceeding.

Similarly, Subsection (b) (§ 9-17-314(b)) grants a litigant immunity from service of process during the time a party is physically present in a state for a UIFSA (§ 9-17-101 et seq.) action. The immunity pro-

vided is limited, however, and is not comparable to diplomatic immunity. This is clear from reading Subsection (c) (§ 9-17-314(c)) in conjunction with the other subsections (§ 9-17-314(a) and (b)); Subsection (c) (§ 9-17-314(c)) withholds immunity from civil litigation unrelated to the support action stemming from contemporaneous acts committed by a party while present in the state for the support litigation. For example, if a petitioner is involved in an automobile accident or a contract dispute over the cost of lodging while present in the state, the immunity provided by this section (§ 9-17-314) is inapplicable.

Comment to Section 315 (A.C.A. § 9-17-315)

Arguably this section (§ 9-17-315) does no more than restate the basic principle of *res judicata*. However, a great variety of state laws exists regarding presumptions of parentage and available defenses after a prior determination of parentage. This section (§ 9-17-315) is intended neither to discourage nor encourage collateral attacks in situations in which the law of a foreign jurisdiction is at significant odds with local law. For example, this section (§ 9-17-315) mandates that a parentage decree rendered by another tribunal is not subject to collateral attack in a UIFSA (§ 9-17-101 et seq.) proceeding except on a fundamental constitutional ground such as lack of jurisdiction over a party or a comparable denial of due process in the previous proceeding. If a collateral attack is permissible on a parentage decree under the law of the issuing jurisdiction,

such an action must be pursued in the appropriate forum and not in the UIFSA (§ 9-17-101 et seq.) proceeding.

Similarly, the law of the issuing state may provide for a determination of parentage based on certain specific acts of the obligor acknowledging parentage as a substitute for a decree, e.g., signing the child's birth certificate or publicly acknowledging a duty of support after receiving the child into his home. The Act (§ 9-17-101 et seq.) also is neutral regarding a collateral attack on such a parentage determination; the responding tribunal must give the same effect to such an act of acknowledgment of parentage as it would receive in the issuing state. The consistent theme of this Section (§ 9-17-315) is that a collateral attack cannot be made in a UIFSA (§ 9-17-101 et seq.) proceeding.

Comment to Section 316 (A.C.A. § 9-17-316)

This section (§ 9-17-316) combines RURESA §§ 9, 19, 21, 22, and 23; and, provides additional innovative methods for gathering evidence in interstate cases.

Subsections (b) through (f) (§ 9-17-316(b) — (f)) greatly expand on RURESA § 23 (Rules of Evidence). The intent is to eliminate as many potential hearsay problems as possible in interstate litigation because usually the out-of-state party and that party's witnesses do not appear in person at the hearing.

Subsection (d) (§ 9-17-316(d)) provides a simplified means for proving health care expenses related to the birth of the child. Because ordinarily these charges are not in dispute, this is designed to obviate the cost of having health care providers appear in person or of obtaining affidavits of business records from each provider.

Subsections (e) and (f) (§ 9-17-316(e) and (f)) encourage tribunals and litigants to take advantage of modern methods of

communication in interstate support litigation.

Subsection (g) (§ 9-17-316(g)) codifies the rule in effect in many states that in civil litigation an adverse inference may be drawn from a litigant's silence. See, e.g., *In re Matter of Joseph P.*, 487 N.Y.S.2d 685 (Fam. Ct. 1985); Pa. Cons. Stats. Ann., Tit. 23, § 5104(c) (1991) (if "any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identity of a child against the party..."); 9 N.J. Stats. Ann. 17-51(d) (1991) ("refusal to submit to blood tests or genetic tests, or both, may be admitted into evidence and shall give rise to the presumption that the results of the tests would have been unfavorable to the interests of the party refusing"); La. Rev. Stats., Tit. 9, § 396(A) (1992) ("if any party refuses to submit to such tests, the court may resolve the question of paternity against such party...").

Comment to Section 317 (A.C.A. § 9-17-317)

This section (§ 9-17-317) is derived from UCCJA § 7(d) (§ 9-13-207(d)) (Inconvenient Forum), which authorizes communications between courts in order to facilitate determination under that Act (§ 9-13-201 et seq.). Much broader coop-

eration between tribunals is permitted under this Act (§ 9-17-101 et seq.) to expedite establishment and enforcement of the support order of either the forum or of the sister state.

Comment to Section 318 (A.C.A. § 9-17-318)

This section (§ 9-17-318) takes another logical step to facilitate interstate cooperation by enlisting the power of the forum to assist a tribunal of another state with the discovery process. The grant of au-

thority is quite broad, enabling the tribunal of the enacting state to fashion its remedies to facilitate discovery consistent with local practice.

Comment to Section 319 (A.C.A. § 9-17-319)

The first sentence of this section (§ 9-17-319) is derived from RURESA § 29 (Additional Duty of Initiating Court). The

second sentence confirms the duty of the agency or tribunal to furnish payment information in interstate cases.

Comment to Section 401 (A.C.A. § 9-17-401)

This section (§ 9-17-401) authorizes a tribunal of the responding state to issue temporary and permanent support orders binding on an obligor over whom the tribunal has personal jurisdiction. It should be emphasized that UIFSA (§ 9-17-101 et seq.) does not permit such orders to be issued when another support order exists

and another tribunal has continuing, exclusive jurisdiction over the matter. See § 205 (§ 9-17-205) (Continuing, Exclusive Jurisdiction) and § 206 (§ 9-17-206) (Enforcement and Modification of Support Order by Tribunal Having Continuing Jurisdiction).

Comment to Section 501 (A.C.A. § 9-17-501)

Direct recognition by the obligor's employer of a withholding order issued by another state has long been sought by support enforcement associations and other advocacy groups. In 1984 Congress mandated that all states adopt procedures for enforcing income-withholding orders of sister states. As a result, the Child Support Project of the American Bar Association and the National Conference of State Legislatures promulgated a Model Interstate Income Withholding Act in 1985. The Model Act has not been widely enacted.

Subsection (a) (§ 9-17-501(a)) directs an employer of the enacting state to recognize a withholding order of a sister state, subject to the employee's right to contest the validity of the order or its enforcement. At present, agencies in several states have adopted a procedure of sending direct withholding requests to out-of-state employers, but this marks the first official sanction of such practices. A recent study by the federal General Accounting Office notes that employers in a second state routinely recognize withholding orders of sister states despite an apparent lack of statutory authority to do so.

This enactment (§ 9-17-501(a)) recognizes actual practice.

Subsection (a) (§ 9-17-501(a)) does not define "regular on its fact," but the term should be liberally construed, see *U.S. v. Morton*, 467 U.S. 822 (1984) ("legal process regular on its face"). The rules governing intrastate procedure and defenses for withholding orders will apply to interstate orders. Thus, Subsection (a) (§ 9-17-501(a)) makes clear that employers who refuse to recognize out of state withholding orders will be subjected to whatever remedies are otherwise available under state law.

Similarly, Subsection (b) (§ 9-17-501(b)) incorporates the law regarding defenses an alleged obligor may raise to an intrastate withholding order into the interstate context. Generally, states have accepted the IV-D requirement that the only allowable defense is a "mistake of fact." 42 U.S.C. § 666(b)(4)(A). This apparently includes "errors in the amount of current support owed, errors in the amount of accrued arrearage ... or mistaken identity of the alleged obligor" while excluding "other grounds, such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances

of the obligor, or lack of visitation.” H.R. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983). The latter claims must be pursued in a separate legal action in the state

having continuing, exclusive jurisdiction over the support order, not in a UIFSA (§ 9-17-101 et seq.) proceeding.

Comment to Section 502 (A.C.A. § 9-17-502)

This section (§ 9-17-502) authorizes summary enforcement of a sister state child support order through any administrative means available for local orders. Under Subsection (a) (§ 9-17-502(a)), any interested party in another state, necessarily including a private attorney or a support enforcement agency, may forward a support order or income-withholding order to a support enforcement agency of the enacting state.

Subsection (b) (§ 9-17-502(b)) directs the support enforcement agency in the enacting state to employ the enacting state’s regular administrative procedures to process the out-of-state order. Thus, a local employer accustomed to dealing with the local agency need not learn a new procedure in order to comply with an out-of-state order.

Comment to Section 601 (A.C.A. § 9-17-601)

Part A of Article (subchapter) 6 (§§ 9-17-601 -- 9-17-604) greatly expands the procedure for the registration of foreign support orders available under RURESA §§ 35-40. The common practice of initiating a new suit for the establishment of a support order irrespective of the fact that there is an existing order for support will become obsolete under UIFSA (§ 9-17-101 et seq.). The fact that RURESA permits (really encourages) initiation of a new suit in those circumstances led to the multiple support order system that UIFSA (§ 9-17-101 et seq.) is designed to eliminate.

Under the one-order system of UIFSA (§ 9-17-101 et seq.), the only existing order is to be enforced. Registration of that order in the responding state is the first step to enforcement by a tribunal of that state. Rather than being an optional de-

vice as is the case under RURESA, registration for enforcement under UIFSA (§ 9-17-101 et seq.) is the primary method for interstate enforcement by a tribunal. If a prior support order has been validly issued, only that order is to be enforced against the obligor in the absence of very narrow strictly defined fact situations in which an existing order may be modified. See §§ 609 through 612 (§§ 9-17-609 — 9-17-612). Additionally, until that order is modified, it is fully enforceable in the responding state.

Registration should be employed if the purpose is enforcement. Although registration not accompanied by a request for affirmative relief is not prohibited, the Act (§ 9-17-101 et seq.) does not contemplate registration as serving a purpose in itself.

Comment to Section 602 (A.C.A. § 9-17-602)

This section (§ 9-17-602) outlines the mechanics for registration of a sister state order. Subsection (c) (§ 9-17-602(c)) warns that if a particular enforcement remedy must be specifically sought under

local law, the same is required in interstate cases. However, the authorization of a later request contemplates that interstate pleadings may be liberally amended to conform to local practice.

Comment to Section 603 (A.C.A. § 9-17-603)

Subsection (a) (§ 9-17-603(a)) is derived from RURESA § 39(a), which states that “filing constitutes registration” Although the registration procedure under

UIFSA (§ 9-17-101 et seq.) is nearly identical to that of RURESA, the underlying intent of registration is radically different. Under RURESA, once an order of State A

is registered in State B, it becomes an order of the latter. Under UIFSA (§ 9-17-101 et seq.), the order continues to be a State A order, which is to be enforced by a tribunal of State B. Although State B's rules of evidence and procedure apply, except as supplemented or specifically superseded by the Act (§ 9-17-101 et seq.), the order itself remains subject to the continuing, exclusive jurisdiction of State A so long as the requirements for that authority set forth in Section 205 (§ 9-17-205) remain intact.

Subsection (b) (§ 9-17-603(b)) is derived from RURESA § 40(a). Although RURESA specifically subjects a registered order to "proceedings for reopening, vacating, or staying as a support order of this State," these remedies are not authorized under UIFSA (§ 9-17-101 et seq.). While a foreign support order is to be enforced and satisfied in the same manner as if it had been issued by a tribunal of the registering state, the order to be enforced remains an order of the issuing state. Conceptually, the responding state is enforcing the order of another state, not its own order. Any request for relief that requires application of the continuing, exclusive jurisdiction of the issuing tribunal must be sought in the issuing forum.

Subsection (c) (§ 9-17-603(c)) mandates enforcement of the registered order. See §§ 606 through 608 (§§ 9-17-606 — 9-17-

608). This is at sharp variance with the RURESA § 40 practice, which states that "the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state." This language was generally interpreted as converting the foreign order into an order of the registering state. Once the registering court concludes that it is enforcing its own order, the next logical step is the conclusion that the order may be modified, which results in another version of the multiple order system. UIFSA (§ 9-17-101 et seq.) mandates an end to this process, except as modification is authorized in this article (subchapter), see §§ 609 through 612 (§§ 9-17-609 — 9-17-612).

Because under UIFSA (§ 9-17-101 et seq.) there is only one order in existence at any one time, that order is enforceable in a responding state irrespective of whether such an order might be modified. That is, if neither the child nor the parties continue to reside in the issuing state, the issuing tribunal loses its continuing, exclusive jurisdiction over its child support order. Nonetheless, the order continues to be fully enforceable until the potential for modification actually occurs in accordance with the strict terms for such an action as set forth in Part C of this article (subchapter), §§ 609-612 (§§ 9-17-609 — 9-17-612).

Comment to Section 604 (A.C.A. § 9-17-604)

This section (§ 9-17-604) identifies situations in which local law is inapplicable. For example, under Subsection (a) (§ 9-17-604 (a)) an order for the support of a child until age 21 must be recognized and enforced in that manner in a state in which the duty of support of a child ends at age 18. See *Gonzalez-Goengaga v. Gonzales*, 426 So.2d 1106 (Fla. App. 1983); *Taylor v. Taylor*, 122 Cal. App. 3d 209, 175 Cal. Rptr. 716 (1981).

Subsection (b) (§ 9-17-604(b)) contains a similar choice of law provision that may diverge from local law. Whichever state's statute of limitations is longer is to be applied. In interstate cases arrearages will often have accumulated over a considerable period of time before enforcement is perfected. The obligor should not gain an undue benefit from the choice of residence if the forum state has a short statute of limitation for arrearages.

Comment to Section 605 (A.C.A. § 9-17-605)

Part B of Article (subchapter) 6 (§ 9-17-605 — 9-17-608) provides the procedure for the nonregistering party to contest registration of an order, either because the order is allegedly invalid, superseded, or no longer in effect, or because the enforce-

ment remedy being sought is opposed by the nonregistering party.

This section (§ 9-17-605) provides that the nonregistering party must be fully informed of the effect of registration. After such notice is given, absent a successful

contest by the nonregistering party, the order will be confirmed and future contest will be precluded.

Comment to Section 606 (A.C.A. § 9-17-606)

Subsection (a) (§ 9-17-606(a)) is derived in part from RURESA § 40(b), under which the “obligor” is directed to contest the registration of a foreign order within a short period of time. This procedure is continued, but the terminology is changed to “nonregistering party” because either the obligor or the obligee may seek to register a foreign support order. Moreover, the subsection (§ 9-17-606(a)) is philosophically very different from RURESA § 40, which directs that a registered order “shall be treated in the same manner as a support order issued by a court of this state.” A contest of the fundamental provisions of the registered order is not permitted “in this State.” The nonregistering party must return to the issuing state to prosecute such a contest, and then only as the law of that state permits. The procedure adopted here (§ 9-17-606(a)) is akin to the prohibition of the nonparentage defense found in Section 315 (§ 9-17-315); that is, raising the issue in a UIFSA (§ 9-17-101 et seq.) proceeding is prohibited, but no attempt is made to preclude the issue from being litigated in another, more appropriate forum if otherwise al-

lowable by that forum. On the other hand, the respondent may assert defenses such as “payment” or “the obligation has terminated” to allegations of past noncompliance with the registered order. Similarly, a constitutionally-based attack may always be asserted, *i.e.*, an alleged lack of personal jurisdiction over a party by the issuing tribunal. There is no defense, however, to the registration of a valid foreign support order.

Subsection (b) (§ 9-17-606(b)) precludes an untimely contest of a registered support order. As noted above, the nonregistering party is free to seek redress in the issuing state from the tribunal with continuing, exclusive jurisdiction over the support order.

Subsection (c) (§ 9-17-606(c)) directs that a hearing be scheduled when the nonregistering party contests some aspect of the registration. At present, federal regulations govern the allowable time frames for contesting income withholding in IV-D cases. See 42 U.S.C. § 666(b). Further codification of that process is unwise.

Comment to Section 607 (A.C.A. § 9-17-607)

Subsection (a) (§ 9-17-607(a)) places the burden on the nonregistering party to assert narrowly defined defenses to registration of a support order.

If the obligor is liable for current support, under Subsection (b) (§ 9-17-607(b)) the tribunal must enter an order to enforce that obligation. Proof of arrearages

must result in enforcement; under the Bradley Amendment, 42 U.S.C. § 666(a) (10), all states are required to treat child support payments as final judgments as they come due (or lose federal funding). Therefore, such arrearages are not subject to retroactive modification.

Comment to Section 608 (A.C.A. § 9-17-608)

The policy determination that foreign support orders may need to be confirmed by the forum tribunal is found in URESA § 40, but the process of confirmation is not explained. Under UIFSA (§ 9-17-101 et seq.), confirmation of an order may be the result of operation of law because of a failure to contest or an unsuccessful con-

test after a hearing. Either method precludes raising any issue that could have been asserted in a hearing. Confirmation of a foreign support order validates both the terms of the order and the asserted arrearages. See *Chapman v. Chapman*, 205 Cal. App. 3d 253, 252 Cal. Rptr. 359 (1988).

Comment to Section 609 (A.C.A. § 9-17-609)

Part C of Article (subchapter) 6 (§§ 9-17-609 — 9-17-612) deals with situations in which it is necessary for a registering state to modify the existing child support order of another state. As long as the issuing state maintains its continuing, exclusive jurisdiction over its order, a registering sister state is precluded from modifying that order. This is a very significant departure from the multiple-order, multiple-modification system of RURESA. However, if the issuing state no longer has a sufficient interest in the modification of its order because neither the child nor the parties continue to reside there, under appropriate circumstances a registering state may assume the power to modify. Note that authority to modify is limited to

child support orders; the Act (§ 9-17-101 et seq.) does not contemplate modification of spousal support orders.

A petitioner wishing to register a support order of another state for purposes of modification must conform to the general requirements for pleadings in Section 311 (§ 9-17-311) (Pleadings and Accompanying Documents), and follow the procedure for registration set forth in Section 602 (§ 9-17-602) (Procedure To Register Order for Enforcement). If the tribunal has the requisite jurisdiction over the parties as established in § 611 (§ 9-17-611), modification may be sought in conjunction with registration and enforcement, or at a later date after the order has been registered, confirmed, and enforced.

Comment to Section 610 (A.C.A. § 9-17-610)

An order registered for purposes of modification may be enforced in the same manner as an order registered for purposes of enforcement. But, the power of

the forum tribunal to modify a child support order of another tribunal is limited by the specific factual preconditions set forth in § 611 (§ 9-17-611).

Comment to Section 611 (A.C.A. § 9-17-611)

When a foreign support order is enforced in a registering state under UIFSA (§ 9-17-101 et seq.), the rights of the parties affected have been litigated previously. Because the obligor already has had a day in court, an enforcement remedy may be summarily invoked. On the other hand, modification of an existing order presupposes a change in the rights of the parties. Therefore, even under RURESA more elaborate procedures were required by most states prior to the issuance of a modified order. These requirements are much more explicit and restrictive under UIFSA (§ 9-17-101 et seq.).

A support order registered under RURESA for the purpose of enforcement is treated as if originally issued by the registering tribunal. Most states have interpreted the RURESA registration provisions as also authorizing prospective modification of the registered order, see, e.g., *Lagerwey v. Lagerwey*, 681 P.2d 309 (Alaska 1984); *In re Marriage of Aron*, 224 Cal. App. 3d 1086 (1990); *MacFadden v. Martini*, 119 Misc. 2d 94, 463 N.Y.S.2d 674 (1983); *Pinner v. Pinner*, 33 N.C. App. 204,

234 S.E.2d 633 (1977). In sum, by its terms RURESA contemplates existence of multiple support orders, none of which is directly related to any of the others. Although the issuing tribunal under RURESA retains continuing jurisdiction to modify its own order, that power is not exclusive. Tribunals in other states often assume jurisdiction to enter new orders or to modify an out-of-state support order.

Under UIFSA (§ 9-17-101 et seq.) a tribunal may modify an existing child support order of another state only if certain quite limited conditions are met. First, the tribunal must have all the prerequisites for the exercise of personal jurisdiction required for rendition of an original support order. Second, one of the restricted fact situations described in Subsection (a) (§ 9-17-611(a)) must be present. This section (§ 9-17-611), which is a counterpart of Section 205(b) (§ 9-17-205(b)) (Continuing, Exclusive Jurisdiction), establishes the conditions under which the continuing jurisdiction of the issuing tribunal is released. The Uniform Child Custody Jurisdiction Act §§ 12-14

(§§ 9-13-212 — 9-13-214) provides general principles for the judicial determination of an appropriate fact situation for subsequent modification of an existing custody order by another court. In contrast, UIFSA (§ 9-17-101 et seq.) establishes a set of “bright line” rules for modification of an existing child support order.

Under UIFSA (§ 9-17-101 et seq.), registration is subdivided into distinct categories: registration for enforcement, for modification, or both. Subsection (a) (§ 9-17-611(a)) contemplates modification of an existing child support order only under the limited circumstances described, thus eliminating multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act (§ 9-17-101 et seq.). The continuing, exclusive jurisdiction of the issuing tribunal remains intact so long as one party or the child continue to reside in the issuing state, or unless the parties mutually agree to the contrary. This is also the standard for recognition of sister state custody orders under the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Once every individual party and the child leave the issuing state, the continuing, exclusive jurisdiction of the tribunal terminates, although the order remains in effect and enforceable until it is modified. If and when the order is modified by a tribunal of another state, the principle of continuing, exclusive jurisdiction is further ratified; the order of the modifying tribunal becomes the operative “only-order-in-effect.”

Under Subsection (a)(1) (§ 9-17-611(a)(1)), all persons affected by the initial order must have moved from the issuing state before a tribunal in a new forum may modify. In virtually all cases, the new forum will be the state of residence of either obligor or obligee. Proof of this may be made directly in the forum state; no purpose would be served by requiring the petitioner to return to the original issuing state for a document to confirm the fact that none of the relevant persons still lives there.

Note that Subsection (a)(1) (§ 9-17-611(a)(1)) requires that the petitioner be a nonresident of the forum in which modification is sought and the respondent to be subject to the jurisdiction of that forum. This contemplates that the issuing state

has lost continuing, exclusive jurisdiction and that the obligee may seek modification in the obligor’s state of residence, or that the obligor may seek a modification in the obligee’s state of residence. This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local court to the marked disadvantage of the other party. For example, an obligor visiting the children at the residence of the obligee cannot be validly served with citation accompanied by a motion to modify the support order. Even though such personal service of the obligor in the obligee’s home state is consistent with the jurisdictional requisites of *Burnham v. Superior Court*, 495 U.S. 604 (1990), the motion to modify does not fulfill the requirement of being brought by “a [petitioner] who is a nonresident of this State . . .” The obligee is required to make that motion in a state other than that of his or her residence which has personal jurisdiction over the obligor. Most typically this will be the state of residence of the obligor. Similarly, fairness requires that an obligee seeking to modify or modify and enforce the existing order in the state of residence of the obligor will not be subject to a cross-motion to modify custody or visitation merely because the issuing state has lost its continuing, exclusive jurisdiction over the support order. The obligor is required to make that motion in a state other than that of his or her residence; most likely, the obligee’s state of residence. Finally, note that if both parties have left the issuing state and now reside in the same state, this section (§ 9-17-611) is not applicable. Such a fact situation does not present an interstate matter and UIFSA (§ 9-17-101 et seq.) does not apply. Rather, the issuing state has lost its continuing exclusive jurisdiction and the forum state, as the residence of both parties, should apply local law without regard to the interstate Act (§ 9-17-101 et seq.).

Subsection (a)(2) (§ 9-17-611(a)(2)) allows the parties to terminate the continuing jurisdiction of the issuing state by agreement even though one of the parties or the child maintains a significant nexus with the issuing state. In contrast to Subsection (a)(1) (§ 9-17-611(a)(1)), this must be initiated and confirmed by the issuing

state and a copy of such an agreement must be filed in the issuing tribunal.

Modification of child support under Subsections (a)(1) and (a)(2) (§ 9-17-611(a)(1) and (2)) is distinct from custody modification under the federal Parental Kidnapping Prevention Act, 42 U.S.C., § 1738A, which provides that the court of continuing, exclusive jurisdiction may "decline jurisdiction." Similar provisions are found in the UCCJA, § 14 (§ 9-13-214). In those statutes the methodology for the declination of jurisdiction is not spelled out, but rather is left to the discretion of possibly competing courts for case-by-case determination. The privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA (§ 9-17-101 et seq.). Once an initial child support order is established, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing court no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a court with modification jurisdiction issues a new order in conformance with this article (subchapter).

Subsection (b) (§ 9-17-611(b)) states that if the forum has modification jurisdiction because the issuing state has lost continuing jurisdiction, the proceedings will generally follow local law with regard to modification of child support orders. However, Subsection (c) (§ 9-17-611(c)) prevents the modification of any final, nonmodifiable aspect of the original order. For example, if child support was ordered through age 21 in accordance with the law of the issuing state and the law of the forum state ends the support obligation at 18, modification by the forum tribunal may not affect the duration of the support order to age 21.

Subsection (d) (§ 9-17-611(d)) provides that upon modification the new order becomes the one-order to be recognized by all UIFSA (§ 9-17-101 et seq.) states, and the issuing tribunal acquires continuing, exclusive jurisdiction.

Finally, Subsection (e) (§ 9-17-611(e)) directs that the original issuing state be notified that it no longer is responsible to exercise its continuing, exclusive jurisdiction.

Comment to Section 612 (A.C.A. § 9-17-612)

Independent support orders relating to the same parties, a hallmark of RURESA, are replaced in UIFSA (§ 9-17-101 et seq.) by deference to the support order of a sister state. This applies not just to the original order, but also to a modified child support order issued by a second state under the standards established by Section 611 (§ 9-17-611) (Modification of Child Support Order of Another State). For the Act (§ 9-17-101 et seq.) to function properly, the original issuing state must recognize and defer to such a modified order, and must regard its prior order as prospectively inoperative. Because the modifying tribunal lacks the authority to direct the original issuing state to release its continuing jurisdiction, each state

must recognize this effect by enacting UIFSA (§ 9-17-101 et seq.).

Power is retained over post-modification by the original issuing tribunal for remedial actions directly connected to its now-modified order. A tribunal may enforce its subsequently modified order for violations of that order which occurred before the modification. Further, aspects of the original order that have become final or are not modifiable may be prospectively enforced by the issuing tribunal. For example, a contractual obligation to provide a college education trust fund for a child may be enforced under the law of the issuing state irrespective of the law of the modifying state.

Comment to Section 701 (A.C.A. § 9-17-701)

This article (subchapter) authorizes a "pure" parentage action in the interstate context, *i.e.*, an action not joined with a claim for support. Either the mother or a

man alleging to be the father of a child may bring such an action. More commonly, an action to determine parentage across state lines will also seek to estab-

lish a support order under the Act (§ 9-17-101 et seq.). See § 401 (§ 9-17-401) ([Petition] to Establish Support Order).

Parentage actions under UIFSA (§ 9-

17-101 et seq.) are to be treated identically to such actions brought in the responding state.

Comment to Section 801 (A.C.A. § 9-17-801)

This section (§ 9-17-801) tracks RURESA § 5 (interstate Rendition) with no substantive change. Virtually no controversy has been generated regarding this portion of RURESA. Arguably application of Subsection (c) (§ 9-17-801(c)) is problematical in situations in which the obligor neither was present in the demanding state at the time of the commission of the crime nor fled from the demanding state. The possibility that an individual may commit a crime in a state without ever being physically present there has elicited considerable discussion and some case law. See L. Brilmayer, "An Introduction to Jurisdiction in the Ameri-

can Federal System," 329-335 (1986) (discussing minimum contacts theory for criminal jurisdiction); Rotenberg, "Extra-territorial Legislative Jurisdiction and the State Criminal Law," 38 Tex. L. Rev. 763, 784-87 (1960) (due process requires defendant's behavior must be predictably subject to state's criminal jurisdiction); cf. *Ex parte Boetscher*, 812 S.W.2d 600 (Tex. Crim. App. 1991) (Equal Protection Clause limits disparate treatment of non-resident defendants); *In re King*, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970, cert. denied 403 U.S. 931) (enhanced offense for nonresidents impacts constitutional right to travel).

Comment to Section 802 (A.C.A. § 9-17-802)

This section (§ 9-17-802) tracks RURESA § 6 (Conditions of Interstate Rendition) without significant change. Interstate rendition remains the last resort

for support enforcement, in part because a governor may exercise considerable discretion in deciding whether to honor a demand for an obligor.

Comment to Section 902 (A.C.A. § 9-17-902)

Renaming the Act (§ 9-17-101 et seq.) reflects the dramatic departure from the

structure of the earlier interstate reciprocal support acts, URESA and RURESA.

UNIFORM TRANSFERS TO MINORS ACT

(§ 9-26-201 ET SEQ.)

Prefatory Note

This Act revises and restates the Uniform Gifts to Minors Act (UGMA), one of the Conference's most successful products, some version of which has been enacted in every American jurisdiction.

The original version of UGMA was adopted by the Conference in 1956 and closely followed a model "Act concerning Gifts of Securities to Minors" which was sponsored by the New York Stock Exchange and the Association of Stock Exchange Firms and which had been adopted in 14 states. The 1956 version of UGMA broadened the model act to cover gifts of money as well as securities but made few other changes.

In 1965 and 1966 the Conference revised UGMA to expand the types of financial institutions which could serve as depositories of custodial funds, to facilitate the designation of successor custodians, and to add life insurance policies and annuity contracts to the types of property (cash and securities) that could be made the subject of a gift under the Act.

Not all states adopted the 1966 revisions; some 11 jurisdictions retained their versions of the 1956 Act. More importantly, however, many states since 1966 have substantially revised their versions of UGMA to expand the kinds of property that may be made the subject of a gift under the Act, and a few states permit transfers to custodians from other sources, such as trusts and estates, as well as lifetime gifts. As a result, a great deal of non-uniformity has arisen among the states. Uniformity in this area is important, for the Conference has cited UGMA as an example of an act designed to avoid conflicts of law when the laws of more than one state may apply to a transaction or a series of transactions.

This Act follows the expansive approach taken by several states and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodian for the benefit of a minor (SECTION 1(6) (A.C.A. § 9-26-201(6))).

In addition, it permits such transfers not only by lifetime outright gifts (SECTION 4 (A.C.A. § 9-26-204)), but also from trusts, estates and guardianships, whether or not specifically authorized in the governing instrument (SECTIONS 5 (A.C.A. § 9-26-205) and 6 (A.C.A. § 9-26-206)), and from other third parties indebted to a minor who does not have a conservator, such as parties against whom a minor has a tort claim or judgment, and depository institutions holding deposits or insurance companies issuing policies payable on death to a minor (SECTION 7 (A.C.A. § 9-26-207)). For this reason, and to distinguish the enactment of this statute from the 1956 and the 1966 versions of UGMA, the title of the Act has been changed to refer to "Transfers" rather than to "Gifts," a much narrower term.

As so expanded, the Act might be considered a statutory form of trust or guardianship that continues until the minor reaches 21. Note, however, that unlike a trust, a custodianship is not a separate legal entity or taxpayer. Under SECTION 11(b) (A.C.A. § 9-26-211(b)) of this Act, the custodial property is indefeasibly vested in the minor, not the custodian, and thus any income received is attributable to and reportable by the minor, whether or not actually distributed to the minor.

The expansion of the Act to permit transfers of any kind of property to a custodian creates a significant problem of potential personal liability for the minor or the custodian arising from the ownership of property such as real estate, automobiles, general partnership interests, and business proprietorships. This problem did not exist under UGMA under which custodial property was limited to bank deposits, securities and insurance. In response, SECTION 17 (A.C.A. § 9-26-217) of this Act generally limits the claims of third parties to recourse against the custodial property, with the minor insulated against personal liability unless he

is personally at fault. The custodian is similarly insulated unless he is personally at fault or fails to disclose his custodial capacity in entering into a contract.

Nevertheless, the Act should be used with caution with respect to property such as real estate or general partnership interests from which liabilities as well as benefits may arise. Many of the possible risks can and should be insured against, and the custodian has the power under SECTION 13(a) (A.C.A. § 9-26-213(a)) to purchase such insurance, at least when other custodial assets are sufficient to do so. If the assets are not sufficient, there is doubt that a custodian will act, or there are significant uninsurable risks, a transferor should consider a trust with spendthrift provisions, such as a minority trust under Section 2503(c), IRC, rather than a custodianship, to make a gift of such property to a minor.

The Act retains (or reverts to) 21 as the

age of majority or, more accurately, the age at which the custodianship terminates and the property is distributed. Since tax law permits duration of Section 2503(c) trusts to 21, even though the statutory age of majority is 18 in most states, this age should be retained since most donors and other transferors wish to preserve a custodianship as long as possible.

Finally, the Act restates and rearranges, rather than amends, the 1966 Act. The addition of other forms of property and other forms of dispositions made adherence to the format and language of the prior act very unwieldy. In addition, the 1966 and 1956 Acts closely followed the language of the earlier model act, which had already been adopted in several states, even though it did not conform to Conference style. It is hoped that this rewriting and revision of UGMA will improve its clarity while also expanding its coverage.

Comment to Section 1 (A.C.A. § 9-26-201)

To reflect the broader scope and the unlimited types of property to which the new Act will apply, a number of definitional changes have been made from the 1966 Act. In addition, several definitions specifically applicable to the limited types of property (cash, securities and insurance policies) subject to the 1966 Act have been eliminated as unnecessary. These include the definitions of "bank," "issuer," "life insurance policy or annuity contract," "security," and "transfer agent." No change in the meaning or construction of these terms as used in this Act is intended by such deletions.

The definitions of "domestic financial institution" and "insured financial institution" have been eliminated because few if any states limit deposits by custodians to local institutions, and the prudent person rule of SECTION 12(b) (A.C.A. § 9-26-212(b)) of this Act may dictate the use of insured institutions as depositories, without having the Act so specify.

The principal changes or additions to the remaining definitions are discussed below.

Paragraph (2) (A.C.A. § 9-26-201(b)). The definition of "benefit plan" is intentionally very broad and is meant to cover any contract, plan, system, ac-

count or trust such as a pension plan, retirement plan, death benefit plan, deferred compensation plan, employment agency arrangement or stock bonus, option or profit sharing plan.

Paragraph (4) (A.C.A. § 9-26-201(d)). The term "conservator" rather than "guardian of the estate" has been employed in the Act to conform to Uniform Probate Code terminology. The term includes a guardian of the minor's property, whether general, limited or temporary, and includes a committee, tutor, or curator of the minor's property.

Paragraph (6) (A.C.A. § 9-26-201(f)). The definition of "custodial property" has been generalized and expanded to encompass every conceivable legal or equitable interest in property of any kind, including real estate and tangible or intangible personal property. The term is intended, for example, to include joint interests with right of survivorship, beneficial interests in land trusts, as well as all other intangible interests in property. Contingent or expectancy interests such as the designation as a beneficiary under insurance policies or benefit plans become "custodial property" only if the designation is irrevocable, or when it becomes so, but

the Act specifically authorizes the "nomination" of a future custodian as beneficiary of such interests (see SECTION 3 (A.C.A. § 9-26-203)). Proceeds of custodial property, both immediate and remote, are themselves custodial property, as is the case under UGMA.

Custodial property is defined without reference to the physical location of the property, even if it has one. No useful purpose would be served by restricting the application of the Act to, for example, real estate "located in this state," since a conveyance recorded in the state of the property's location, if done with proper formalities, should be effective even if that state has not enacted this Act. The rights, duties and powers of the custodian should be determined by reference to the law of the state under which the custodianship is created, assuming there is sufficient nexus under SECTION 2 (A.C.A. § 9-26-202) between that state and the transferor, the minor or the custodian.

Paragraph (11) (A.C.A. § 9-26-201(k)). This definition of "minor" retains the historical age of 21 as the age of majority, even though most states have lowered the age for most other purposes, as well as in their versions of the 1966 Act. Nevertheless, because the Internal Revenue Code continues to permit "minority trusts" under Section 2503(c), IRC, to continue in effect until age 21, and because it is believed that most donors creating minority trusts or custodianships prefer to retain the property under management for the benefit of the young person as long as possible, it is strongly suggested that the age of 21 be retained as the age of majority under this Act. For states that have reduced the age of majority in their versions of the 1966 Act, SEC-

TION 22(c) (A.C.A. § 9-26-222(c)) of this Act provides that a change back to 21 will not affect custodianships that have already terminated at an earlier age.

Paragraph (13) (A.C.A. § 9-26-201(m)). The definition of the term "personal representative" is based upon that definition in Sec. 1-201(30) of the Uniform Probate Code.

Paragraph (15) (A.C.A. § 9-26-201(o)). The new definition of "transfer" is necessary to reflect the application of the Act not only to gifts, but also to distributions from trusts and estates, obligors of the minor, and transfers of the minor's own assets to a custodianship by the legal representative of a minor, all of which are now permitted by this Act.

Paragraph (16) (A.C.A. § 9-26-201(p)). The new definition of "transferor" is required because the term includes not only the maker of a gift, i.e., a donor in the usual sense, but also fiduciaries and obligors who control or own property that is the subject of the transfer. Nothing in this Act requires that a transferor be an "adult." If permitted under other law of the enacting state relating to emancipation or competence to make a will, gift, or other transfer, a minor may make an effective transfer of property to a custodian for his benefit or for the benefit of another minor.

Paragraph (17) (A.C.A. § 9-26-201(q)). Only entities authorized to exercise "general" trust powers qualify as "trust companies"; that is, the authority to exercise only limited fiduciary responsibilities, such as the authority to accept Individual Retirement Account deposits, is not sufficient.

Comment to Section 2 (A.C.A. § 9-26-202)

This section has no counterpart in the 1966 Act. It attempts to resolve uncertainties and conflicts-of-laws questions that have frequently arisen because of the present nonuniformity of UGMA in the various states and which may continue to arise during the transition from UGMA to this Act.

The creation of a custodianship must

invoke the law of a particular state because of the form of the transfer required under SECTION 9(a) (A.C.A. § 9-26-209(a)). This section provides that a choice of the UTMA of the enacting state is appropriate and effective if any of the nexus factors specified in subsection (a) (A.C.A. § 9-26-202(a)) exists at the time of the transfer. This Act continues to govern,

and subsection (b) (A.C.A. § 9-26-202(b)) makes the custodian accountable and subject to personal jurisdiction in the courts of the enacting state for the duration of the custodianship, despite subsequent relocation of the parties or the property.

Subsection (c) (A.C.A. § 9-26-202(c)) recognizes that residents of the enacting state may elect to have the law of another state apply to a transfer. That choice is valid if a nexus with the chosen state exists at the time of the transfer. If personal jurisdiction can be obtained in the

enacting state under other law apart from this Act, the custodianship may be enforced in its courts, which are directed to apply the law of the state elected by the transferor.

If the choice of a law under subsection (a) (A.C.A. § 9-26-202(a)) or (c) (A.C.A. § 9-26-202(c)) is ineffective because of the absence of the required nexus, the transfer may still be effective under the Act of another state with which a nexus does exist. See SECTION 21 (A.C.A. § 9-26-221).

Comment to Section 3 (A.C.A. § 9-26-203)

This section is new and permits a future custodian for a minor to be nominated to receive a distribution under a will or trust, or as a beneficiary of a power of appointment, or of contractual rights such as a life or endowment insurance policy, annuity contract, P.O.D. Account, benefit plan, or similar future payment right. Nomination of a future custodian does not constitute a “transfer” under this Act and does not create custodial property. If it did, the nomination and beneficiary designation would have to be permanent, since a “transfer” is irrevocable and indefeasibly vests ownership of the interest in the minor under SECTION 11(b) (A.C.A. § 9-26-211(b)).

Instead this section permits a revocable beneficiary designation that takes effect only when the donor dies, or when a lifetime transfer to the custodian for the minor beneficiary occurs, such as a distribution under an inter vivos trust. How-

ever, an unrevoked nomination under this section is binding on a personal representative or trustee (see SECTION 5(b)) (A.C.A. § 9-26-205(b)) and on insurance companies and other obligors who contract to pay in the future (see SECTION 7(b) (A.C.A. § 9-26-207(b))).

The person making the nomination may name contingent or successive future custodians to serve, in the order named, in the event that the person first nominated dies, or is unable, declines, or is ineligible to serve. Such a substitute future custodian is a custodian “nominated ... under Section 3” to whom the transfer must be made under SECTIONS 5(b) (A.C.A. § 9-26-205(b)) and 7(b) (A.C.A. § 9-26-207(b)).

Any person nominated as future custodian may decline to serve before the transfer occurs and may resign at any time after the transfer. See SECTION 18 (A.C.A. § 9-26-218).

Comment to Section 4 (A.C.A. § 9-26-204)

To emphasize the different kinds of transfers that create presently effective custodianships under this Act, they are separately described in SECTIONS 4 (A.C.A. § 9-26-204), 5 (A.C.A. § 9-26-205), 6 (A.C.A. § 9-26-206) and 7 (A.C.A. § 9-26-207). This section in part corresponds to Section 2(a) of the 1966 Act and covers the traditional lifetime gift that

was the only kind of transfer authorized by the 1966 Act. It also covers an irrevocable exercise of a power of appointment in favor of a custodian, as distinguished from the exercise of a power in a revocable instrument that results only in the nomination of a future custodian under SECTION 3 (A.C.A. § 9-26-203).

Comment to Section 5 (A.C.A. § 9-26-205)

This section is new and has no counterpart in the 1966 Act. It is based on non-uniform provisions adopted by Connecticut, Illinois, Wisconsin and other states to validate distributions from trusts and estates to a custodian for a minor beneficiary, when the use of a custodian is ex-

pressly authorized by the governing instrument. It also covers the designation of the custodian whenever the settlor or testator fails to make a nomination, or the future custodian nominated under SECTION 3 (A.C.A. § 9-26-203) (and any alternate named) fails to qualify.

Comment to Section 6 (A.C.A. § 9-26-206)

This section is new and has no counterpart in the 1966 Act. It covers a new concept, already authorized by the law of some states through nonuniform amendments to the 1966 Act, to permit custodianships to be used as guardianship or conservator substitutes, even though not specifically authorized by the person whose property is the subject of the transfer. It also permits the legal representative of the minor, such as a conservator or guardian, to transfer the minor's own property to a new or existing custodianship for the purposes of convenience or economies of administration.

A custodianship may be created under this section even though not specifically authorized by the transferor, the testator, or the settlor of the trust if three tests are satisfied. First, the fiduciary making the transfer must determine in good faith and in his fiduciary capacity that a custodianship will be in the best interests of the minor. Second, a custodianship may not be prohibited by, or inconsistent with, the terms of any governing instrument. Inconsistent terms would include, for example, a spendthrift clause in a governing trust, provisions terminating a governing trust for the minor's benefit at a time other

than the time of the minor's age of majority, and provisions for mandatory distributions of income or principal at specific times or periodic intervals. Provisions for other outright distributions or bequests would not be inconsistent with the creation of a custodianship under this section. Third, the amount of property transferred, (as measured by its value) must be of such relatively small amount that the lack of court supervision and the typically stricter investment standards that would apply to the conservator otherwise will not be important. However, if the property is of significant size, transfer to a custodian may still be made if the court approves and if the other two tests are met.

The custodianship created under this section without express authority in the governing instrument will terminate upon the minor's attainment of the statutory age of majority of the enacting state apart from this Act, i.e., at the same age a conservatorship of the minor would end. See SECTION 20(b)* and the Comment thereto.

* There is no Section 20(b).

Comment to Section 7 (A.C.A. § 9-26-207)

This section is new and, like SECTION 6 (A.C.A. § 9-26-206), permits a custodianship to be established as a substitute for a conservator to receive payments due a minor from sources other than estates, trusts, and existing guardianships covered by SECTIONS 5 (A.C.A. § 9-26-205) and 6 (A.C.A. § 9-26-206). For example, a tort judgment debtor of a minor, a bank holding a joint or P.O.D. account of which a minor is the surviving payee, or an insurance company holding life insurance

policy or benefit plan proceeds payable to a minor may create a custodianship under this section.

Use of this section is mandatory when a future custodian has been nominated under SECTION 3 (A.C.A. § 9-26-203) as a named beneficiary of an insurance policy, benefit plan, deposit account, or the like, because the original owner of the property specified a custodianship (and a future custodian) to receive the property. If that custodian (or any alternate named) is not

available, if none was nominated, or none could have been nominated (as in the case of a tort judgment payable to the minor), this section is permissive and does not preclude the obligor from requiring the

appointment of a conservator to receive payment. It allows the obligor to transfer to a custodian unless the property exceeds the stated value, in which case a conservator must be appointed to receive it.

Comment to Section 8 (A.C.A. § 9-26-208)

This section discharges transferors from further responsibility for custodial property delivered to and receipted for by the custodian. See also SECTION 16 (A.C.A. § 9-26-216) which protects transferors and other third parties dealing with custodians. Because a discharge or release for a donative transfer is not necessary, this section had no counterpart in the 1966 Act.

This section does not authorize an existing custodian, or a custodian to whom an obligor makes a transfer under SECTION 7 (A.C.A. § 9-26-207), to settle or release a claim of the minor against a third party. Only a conservator, guardian ad litem or other person authorized under other law to act for the minor may release such a claim.

Comment to Section 9 (A.C.A. § 9-26-209)

The 1966 Act contained optional bracketed language permitting an adopting state to limit the class of eligible initial custodians to an adult member of the minor's family or a guardian of the minor. This optional limitation has been deleted because it would preclude the use of an individual and uncompensated custodian if no qualified or willing family member is available.

Otherwise, with respect to transfers of securities, cash, and insurance or annuity contracts, this section tracks the cognate provisions of subsection 2(a) of the 1966 Act, with one exception. Under subsection (a)(1)(ii) (A.C.A. § 9-26-209(a)(1)(ii)) of this section, a transfer of securities in registered form may be accomplished without registering the transfer in the name of the custodian so that the transfer may be accomplished more expeditiously, and so that securities may be held by custodians in street name. In other words, subsection (a)(1)(i) (A.C.A. § 9-26-209(a)(1)(i)) is not the exclusive manner for making effective transfers of securities in registered form.

In addition, subsection (a) (A.C.A. § 9-26-209(a)) creates new procedures for handling the additional types of property now subject to the Act; specifically:

Paragraph (3) (A.C.A. § 9-26-209(a)(3)) covers the irrevocable transfer of ownership of like and endowment insurance policies and annuity contracts.

Paragraph (4) (A.C.A. § 9-26-209(a)(4)) covers the irrevocable exercise of a power of appointment and the irrevocable present assignment of future payment rights, such as royalties, interest and principal payments under a promissory note, or beneficial interests under life or endowment or annuity insurance contracts or benefit plans. The payor, issuer, or obligor may require additional formalities such as completion of a specific assignment form and an endorsement, but the transfer is effective upon delivery of the notification. See SECTION 3 (A.C.A. § 9-26-203) and the Comment thereto for the procedure for revocably "nominating" a future custodian as a beneficiary of a power of appointment or such payment rights.

Paragraph (5) (A.C.A. § 9-26-209(a)(5)) is the exclusive method for the transfer of real estate and includes a disposition effected by will. Under the law of those states in which a devise of real estate vests in the devisee without the need for a deed from the personal representative of the decedent, a document such as the will must still be "recorded" under this provision to make the transfer effective. For inter vivos transfers, of course, a conveyance in recordable form would be employed for dispositions of real estate to a custodian.

Paragraph (6) (A.C.A. § 9-26-

209(a)(6)) covers the transfer of personal property such as automobiles, aircraft, and other property subject to registration of ownership with a state or federal agency. Either registration of the transfer in the name of the custodian or delivery of the endorsed certificate in registerable form makes the transfer effective.

Paragraph (7) (A.C.A. § 9-26-209(a)(7)) is a residual classification, covering all property not otherwise covered in the preceding paragraphs. Examples would include nonregistered securities, partnership interests, and tangible personal property not subject to title certificates.

The form of the transfer document recommended and set forth in subsection (b) (A.C.A. § 9-26-209(b)) contains an acceptance that must be executed by the custodian to make the disposition effective. While such a form of written acceptance is not specifically required in the case of registered securities under subsection (a)(1) (A.C.A. § 9-26-209(a)(1)), money under (a)(2) (A.C.A. § 9-26-209(a)(2)), insurance contracts or interests under (a)(3) (A.C.A. § 9-26-209(a)(3)) or (4) (A.C.A. § 9-26-209(a)(4)), real estate under (a)(5) (A.C.A. § 9-26-209(a)(5)), or titled property under (a)(6) (A.C.A. § 9-26-209(a)(6)), it is certainly the better and recommended practice to obtain the acknowledgment, consent, and acceptance of the designated custodian on the instrument of transfer, or otherwise.

A transferor may create a custodianship by naming himself as custodian, except for transfers of securities under subsection (a)(1)(ii) (A.C.A. § 9-26-209(a)(1)(ii)), insurance and annuity contracts under (a)(3)(ii) (A.C.A. § 9-26-209(a)(3)(ii)), and titled personalty under (a)(6)(ii) (A.C.A. § 9-26-209(a)(6)(ii)), which are made without registering them in the name of the custodian, and transfers of the residual class of property covered by (a)(7) (A.C.A. § 9-26-209(a)(7)). In all of these cases a transfer of possession and control to a third party is necessary to establish donative intent and consummation of the transfer, and designation of the transferor as custodian renders the transfer invalid under SECTION 11(a)(2) (A.C.A. § 9-26-211(a)(2)).

Note, also, that the Internal Revenue Service takes the position that custodial property is includable in the gross estate of the donor if he appoints himself custodian and dies while serving in that capacity before the minor attains the age of 21. Rev.Rul. 57-366, C.B. 1957-2, 618; Rev.Rul. 59-357, C.B. 1959-2, 212; Rev.Rul. 70-348, C.B. 1970-2, 193; *Estate of Prudowsky v. Comm'r*, 55 T.C. 890 (1971), *aff'd per curiam*, 465 F.2d 62 (7th Cir. 1972).

This Act has been drafted in an attempt to avoid income attribution to the parent or inclusion of custodial insurance policies on a custodian's life in the estate of the custodian through the changes made in the standards for expenditure of custodial property and the custodian's incidents of ownership in custodial property. See SECTIONS 13 (A.C.A. § 9-26-213) and 14 (A.C.A. § 9-26-214) and the Comments thereto. However, the much greater problem of inclusion of custodial property in the estate of the donor who serves as custodian remains. Therefore, despite the fact that this section of the Act permits it in the case of registered securities, money, life insurance, real estate, and personal property subject to titling laws, it is generally still inadvisable for a donor to appoint himself custodian or for a parent of the minor to serve as custodian. See, generally Sections 2036 and 2038 I.R.C. and Rulings and cases cited above; with respect to gifts of closely held stock when a donor retains voting rights by serving as custodian, see Section 2036(b), I.R.C., overruling *U.S. v. Bynum*, 408 U.S. 125 (1972), rehearing denied, 409 U.S. 898.

Subsection (c) (A.C.A. § 9-26-209(c)) tracks in substance Section 2(c) of the 1966 Act. However, it replaces the requirement that the transferor "promptly do all things within his power" to complete the transfer, with the requirement that such action must be taken "as soon as practicable." This change is intended only to reflect the fact that possession and control of property transferred from an estate can rarely be accomplished with the immediacy that the term "promptly" may have implied. In the case of inter vivos transfers, no relaxation of the former requirement is intended, since "prompt" transfer of dominion is usually practicable.

Comment to Section 10 (A.C.A. § 9-26-210)

The first sentence follows Section 2(b) of the 1966 Act. The second sentence states what was implicit in the 1966 Act, that additional transfers at different times and from different sources may be made to an existing custodian for the minor and do not create multiple custodianships. This provision also permits an existing custodian to be named as successor custodian by another custodian for the same minor who resigns under SECTION 18 (A.C.A. § 9-26-218) for the purpose of consolidating the assets in a single custodianship.

Note, however, that these results are limited to transfers made “under this Act.” Gifts previously made under the enacting state’s UGMA or under the UTMA of another state must be treated as separate custodianships, even though the

same custodian and minor are involved, because of possible differences in the age of distribution and custodian’s powers under those other Acts.

Even when all transfers to a single custodian are made “under this Act” and a single custodianship results, custodial property transferred under SECTIONS 6 (A.C.A. § 9-26-206) and 7 (A.C.A. § 9-26-207) must be accounted for separately from property transferred under SECTIONS 4 (A.C.A. § 9-26-204) and 5 (A.C.A. § 9-26-205) because the custodianship will terminate sooner with respect to the former property if the enacting state has a statutory age of majority lower than 21. See SECTION 20 (A.C.A. § 9-26-220) and the Comment thereto.

Comment to Section 11 (A.C.A. § 9-26-211)

Subsection (a) (A.C.A. § 9-26-211(a)) generally tracks Section 2(c) of the 1966 Act, except that the transferor’s designation of himself as custodian of property for which he is not eligible to serve under SECTION 9(a) (A.C.A. § 9-26-209(a)) makes the transfer ineffective. See Comment to SECTION 9 (A.C.A. § 9-26-209).

The balance of this section generally tracks Section 3 of the 1966 Act with a number of necessary, and perhaps significant, changes required by the new kinds of property subject to custodianships. The 1966 Act provides that a transfer made in accordance with its terms “conveys to the minor indefeasibly vested legal title to the [custodial property].” Because equitable interests in property may be the subject of a transfer under this Act, the reference to “legal title” has been deleted, but no change concerning the effect or finality of the transfer is intended.

However, subsection (b) (A.C.A. § 9-26-211(b)) qualifies the rights of the minor in the property, by making them subject to “the rights, powers, duties, and authority” of the custodian under this Act, a concept that may have been implicit and intended in the 1966 Act, but not expressed. The concept is important because of the kinds of property, particularly real estate, now subject to custodianship. If the minor is married, it would be possible for home-

stead, dower, or community property rights to attach to real estate (or other property) acquired after marriage by the minor through a transfer to a custodianship for his benefit. The quoted language qualifying the minor’s interest in the property is intended to override these rights insofar as they may conflict with the custodian’s ability and authority to manage, sell, or transfer such property while it is custodial property. Upon termination of the custodianship and transfer of the custodial property to the former minor, the custodial property would then become subject to such spousal rights for the first time.

For a list of the immunities enjoyed by third persons under subsection (c) (A.C.A. § 9-26-211(c)), see SECTION 16 (A.C.A. § 9-26-216) and the Comment thereto.

Because a custodianship under this Act can extend beyond the age of majority in many states, or beyond emancipation of a minor through marriage or otherwise, the Drafting Committee considered the addition of a spendthrift clause to this section. The idea was rejected because neither the 1966 Act nor its predecessors had such a provision, because spendthrift protection would extend only until 21 in any event and judgments against the minor would then be enforceable, and because the spendthrift qualification on the interest of

the minor in the property may be inconsistent with the theory of the Act to convey the property indefeasibly to the minor.

Comment to Section 12 (A.C.A. § 9-26-212)

Subsection (a) (A.C.A. § 9-26-212(a)) expands Section 4(a) of the 1966 Act to include the duties to take control and appropriately register or record custodial property in the name of the custodian.

Subsection (b) (A.C.A. § 9-26-212(b)) restates and makes somewhat stricter the prudent man fiduciary standard for the custodian, since it is now cast in terms of a prudent person "dealing with property of another" rather than one "who is seeking a reasonable income and the preservation of his capital," as under the 1966 Act. The rule also adds a slightly higher standard for professional fiduciaries. The rule parallels section 7-302 of the Uniform Probate Code in order to refer to the existing and growing body of law interpreting that standard. The 1966 Act permitted a custodian to retain any security or bank account received, without the obligation to diversify investment. This subsection extends that rule to any property received.

In order to eliminate any uncertainty that existed under the 1966 Act, subsection (c) (A.C.A. § 9-26-212(c)) grants specific authority to invest custodial property in life insurance on the minor's life, provided the minor's estate is the sole beneficiary, or on the life of another person in whom the minor has an insurable inter-

est, provided the minor, the minor's estate, or the custodian in his custodial capacity is made the beneficiary of such policies.

Subsection (d) (A.C.A. § 9-26-212(d)) generally tracks Section 4(g) of the 1966 Act but adds the provision requiring that custodial property consisting of an undivided interest be held as tenant in common. This provision permits the custodian to invest custodial property in common trust funds, mutual funds, or in a proportional interest in a "jumbo" certificate of deposit. Investment in property held in joint tenancy with right of survivorship is not permitted, but the Act does not preclude a transfer of such an interest to a custodian and the custodian is authorized under subsection (b) (A.C.A. § 9-26-212(b)) to retain a joint tenancy interest so received.

Subsection (e) (A.C.A. § 9-26-212(e)) follows Section 4(h) of the 1966 Act, but adds the requirement that income tax information be maintained and made available for preparation of the minor's tax returns. Because the custodianship is not a separate legal entity or taxpayer, the minor's tax identification number should be used to identify all custodial property accounts.

Comment to Section 13 (A.C.A. § 9-26-213)

Subsection (a) (A.C.A. § 9-26-213(a)) replaces the specific list of custodian's powers in Section 4(f) of the 1966 Act which related only to the securities, money, and insurance, then the only permitted kinds of custodial property. It was determined not to expand the list to try to deal with all forms of property now covered by the Act and to specify all powers that might be appropriate for each kind of property, or to refer to an existing body of state law, such as the Trustee's Powers Act, since such powers would not be uniform. Instead, this provision grants the custodian the very broad and general powers of an unmarried adult owner of the property, subject to the prudent person

rule and to the duties of segregation and record keeping specified in SECTION 12 (A.C.A. § 9-26-212). This approach permits the Act to be self-contained and more readily understandable by volunteer, non-professional fiduciaries, who most often serve as custodians. It is intended that the authority granted includes the powers most often suggested for custodians, such as the power to borrow, whether at interest or interest free, the power to invest in common trust funds, and the power to enter contracts that extend beyond the termination of the custodianship.

Subsection (a) (A.C.A. § 9-26-213(a)) further specifies that the custodian's powers or incidents of ownership in custodial

property such as insurance policies may be exercised only in his capacity as custodian. This provision is intended to prevent the exercise of those powers for the direct or indirect benefit of the custodian, so as to avoid as nearly as possible the result that a custodian who dies while holding

an insurance policy on his own life for the benefit of a minor will have the policy taxed in his estate. See, Section 2042, I.R.C.; but compare *Terriberry v. U.S.*, 517 F.2d 286 (5th Cir. 1975), and *Rose v. U.S.*, 511 F.2d 259 (5th Cir. 1975).

Comment to Section 14 (A.C.A. § 9-26-214)

Subsections (a) (A.C.A. § 9-26-214(a)) and (b) (A.C.A. § 9-26-214(b)) track subsections (b) and (c) of Section 4 of the 1966 Act, but with two significant changes. The standard for expenditure of custodial property has been amended to read "for the use and benefit of the minor," rather than "for the support, maintenance, education and benefit of the minor" as specified under the 1966 Act. This change is intended to avoid the implication that the custodial property can be used only for the required support of the minor.

The IRS has taken the position that the income from custodial property, to the extent it is used for the support of the minor-donee, is includable in the gross income of any person who is legally obligated to support the minor-donee, whether or not that person or parent is serving as the custodian. Rev.Rul. 56-484, C.B. 1956-2, 23; Rev.Rul. 59-357, C.B. 1959-2, 212. However, Reg. 1.662(a)-4 provides that the term "legal obligation" includes a legal obligation to support another person if, and only if, the obligation is not affected by the adequacy of the dependent's own resources. Thus, if under local law a parent may use the resources of a child for the child's support in lieu of supporting the child himself or herself, no obligation of support exists, whether or not income is actually used for support, at least if the child's resources are adequate. See, Bittker, *Federal Taxation of Income Estates and Gifts* ¶ 80.44 (1981).

For this reason, new subsection (c) (A.C.A. § 9-26-214(c)) has been added to specify that distributions or expenditures

may be made for the minor without regard to the duty or ability of any other person to support the minor and that distributions or expenditures are not in substitution for, and shall not affect, the obligation of any person to support the minor. Other possible methods of avoiding the attribution of custodial property income to the person obligated to support the minor would be to prohibit the use of custodial property or its income for that purpose, or to provide that any such use gives rise to a cause of action by the minor against his parent to the extent that custodial property or income is so used. The first alternative was rejected as too restrictive, and the second as too cumbersome.

The "use and benefit" standard in subsections (a) (A.C.A. § 9-26-214(a)) and (b) (A.C.A. § 9-26-214(b)) is intended to include payment of the minor's legally enforceable obligations such as tax or child support obligations or tort claims. Custodial property could be reached by levy of a judgment creditor in any event, so there is no reason not to permit custodian or court-ordered expenditures for enforceable claims.

An "interested person" entitled to seek court ordered distributions under subsection (b) (A.C.A. § 9-26-214(b)) would include not only the parent or conservator or guardian of the minor and a transferor or a transferor's legal representative, but also a public agency or official with custody of the minor and a third party to whom the minor owes legally enforceable debts.

Comment to Section 15 (A.C.A. § 9-26-215)

This section parallels and restates Section 5 of the 1966 Act. It deletes the statement that a custodian may act without compensation for services, since that concept is implied in the retained provi-

sion that a custodian has an "election" to be compensated. However, to prevent abuse, the latter provision for permissive compensation is denied to a custodian who is also the donor of the custodial property.

The custodian's election to charge compensation must be exercised (although the compensation need not be actually paid) at least annually or it lapses and may not be exercised later. This provision is intended to avoid imputed income to the custodian who waives compensation, and also to avoid the accumulation of a large unanticipated claim for compensation exercisable at termination of the custodianship.

This section deletes as surplusage the bracketed optional standards contained in the 1966 Act for determining "reasonable

compensation" which included, "in the order stated," a direction by the donor, statutes governing compensation of custodians or guardians, or court order. While compensation of custodians becomes a more likely occurrence and a more important issue under this Act because property requiring increased management may now be subject to custodianship, compensation can still be determined by agreement, by reference to a statute or by court order, without the need to so state in this Act.

Comment to Section 16 (A.C.A. § 9-26-216)

This section carries forward, but shortens and simplifies, Section 6 of the 1966 Act, with no substantive change intended. The 1966 revision permitted a 14-year old minor to appoint a successor custodian and specifically provided that third parties were entitled to rely on the appointment. Because this section refers to any custodian, and "custodian" is defined to include successor custodians (SECTION 1(7) (A.C.A. § 9-26-201(g))), a successor custodian appointed by the minor is included among those upon whom third parties may rely.

Similarly, because this section protects any third "persons," it is not necessary to specify here or in SECTION 11(c) (A.C.A. § 9-26-211(c)) that it extends to any "issuer, transfer agent, bank, life insurance

company, broker, or other person or financial institution," as did the 1966 Act. See the definition of "person" in SECTION 1(12) (A.C.A. § 9-26-201(1)).

This section excludes from its protection persons with "knowledge" of the irregularity of a transaction, a concept not expressed but probably implied in Section 6 of the 1966 Act. See, e.g., *State ex rel. Paden v. Currel*, 597 S.W.2d 167 (Mo.App.1980) disapproving the pledge of custodial property to secure a personal loan to the custodian.

Similarly, this section does not alter the requirements for bona fide purchaser or holder in due course status under other law for persons who acquire from a custodian custodial property subject to recordation or registration.

Comment to Section 17 (A.C.A. § 9-26-217)

This section has no counterpart in the 1966 Act and is based upon Section 5-429 of the Uniform Probate Code, relating to limitations on the liability of conservators. Because some forms of custodial property now permitted under this Act can give rise to liabilities as well as benefits (e.g., general partnership interests, interests in real estate or business proprietorships, automobiles, etc.) the Committee believes it is necessary to protect the minor and other assets he might have or acquire from such liabilities, since the minor is unable to disclaim a transfer to a custodian for his benefit. Similar protection for the custodian is necessary so as not to discourage nonprofessional or uncompensated persons from accepting the office.

Therefore this section generally limits the claims of third parties to recourse against the custodial property, as third parties dealing with a trust are generally limited to recourse against the trust corpus.

The custodian incurs personal liability only as provided in subsection (b) (A.C.A. § 9-26-217(b)) for actual fault or for failure to disclose his custodial capacity "in the contract" when contracting with third parties. In oral contracts, oral disclosure of the custodial capacity is sufficient. The minor, on the other hand, incurs personal liability under subsection (c) (A.C.A. § 9-26-217(c)) only for actual fault.

When custodial property is subjected to claims of third parties under this section, the minor or his legal representative, if

not a party to the action by which the claim is successfully established, may seek to recover the loss from the custodian

in a separate action. See SECTION 19 (A.C.A. § 9-26-219) and the Comment thereto.

Comment to Section 18 (A.C.A. § 9-26-218)

This section tracks but condenses Section 7 of the 1966 Act to provide that the custodian, or if the custodian does not do so, the minor if he is 14, may appoint the successor custodian, or failing that, that the conservator of the minor or a court appointee shall serve. It also covers disclaimer of the office by designated or successor custodians or by nominated future custodians who decline to serve.

This Act broadens the category of per-

sons who may be designated by the initial custodian as successor custodian from an adult member of the minor's family, his conservator, or a trust company to any adult or trust company. However, the minor's designation remains limited to an adult member of his family (expanded to include a spouse and a stepparent, see SECTION 1(10)), his conservator, or a trust company.

Comment to Section 19 (A.C.A. § 9-26-219)

This section carries forward Section 8 of the 1966 Act, but expands the class of parties who may require an accounting by the custodian to include any person who made a transfer to him (or any such person's legal representative), the minor's guardian of the person, and the successor custodian.

Subsection (b) (A.C.A. § 9-26-219(b)) authorizes but does not obligate a successor custodian to seek an accounting by the predecessor custodian. Since the minor and other persons mentioned in subsection (a) (A.C.A. § 9-26-219(a)) may also seek an accounting from the predecessor at any time, it is anticipated that the exercise of this right by the successor should be rare.

Subsection (a) (A.C.A. § 9-26-219(a)) also gives the same parties (other than a successor custodian) the right to seek recovery from the custodian for loss or dim-

inution of custodial property resulting from successful claims by third persons under SECTION 17 (A.C.A. § 9-26-217), unless that issue has already been adjudicated in an action under that section to which the minor was a party.

This section does not contain a separate statute of limitations precluding petitions for accounting after termination of the custodianship. Because custodianships can be created without the knowledge of the minor, a person might learn of a custodian's failure to turn over custodial property long after reaching majority, and should not be precluded from asserting his rights in the case of such fraud. In addition, the 1966 Act has no such preclusion and seems to have worked well. Other law, such as general statutes of limitation and the doctrine of laches, should serve adequately to protect former custodians from harassment.

Comment to Section 20 (A.C.A. § 9-26-220)

This section tracks Section 4(d) of the 1966 Act, but provides that custodianships created by fiduciaries without express authority from the donor of the property under SECTION 6 (A.C.A. § 9-26-206) and by obligors of the minor under SECTION 7 (A.C.A. § 9-26-207) terminate upon the minor's attaining the age of majority under the general laws of

the state, since these custodianships are substitutes for conservatorships that would otherwise terminate at that time. Because property in a single custodianship may be distributable at different times, separate accounting for custodial property by source may be required. See Comment to SECTION 10 (A.C.A. § 9-26-210).

Comment to Section 21 (A.C.A. § 9-26-221)

This section is new and has two purposes. First, it operates as a “savings clause” to validate transfers made after its effective date which mistakenly refer to the enacting state’s UGMA rather than to this Act. Second, it validates transfers attempted under the UGMA of another

state which would not permit transfers from that source or of property of that kind or under the UTMA of another state with no nexus to the transaction, provided in each case that the enacting state has a sufficient nexus to the transaction under SECTION 2 (A.C.A. § 9-26-202).

Comment to Section 22 (A.C.A. § 9-26-222)

Subsection (a) (A.C.A. § 9-26-222(a)) is new and is based on Section 45-109a of the Connecticut Act which validates gifts of real estate and partnership interests made prior to their inclusion as “custodial property” under that Act. However, this provision goes further and purports also to validate prior transfers of the kind now covered by the Act, i.e., transfers from estates, trusts, guardianships, and obligors.

All states have previously enacted some version of UGMA, and it will be more orderly to subject gifts or other transfers under the prior Act to the procedures of this Act, rather than to keep both Acts in force, presumably for 18 or 21 years until all custodianships created under prior law have terminated. Subsection (b) (A.C.A.

§ 9-26-222(b)) is intended to apply this Act to prior gifts and existing custodianships insofar as it is constitutionally permissible to do so. However, prior custodianships will continue to terminate at the age prescribed under the prior Act.

Optional subsection (c) (A.C.A. § 9-26-222(c)) is also new and is based upon Section 45-109b of the Connecticut Act. It is intended for adoption in those states that amended their Acts to reduce the age of majority to 18, but which adopt the recommended return to 21 as the age at which custodianships terminate. Its purpose is to avoid resurrecting custodianships for persons not yet 21 which terminated during the period that the age of 18 governed termination.

UNIFORM SECURITIES OWNERSHIP BY MINORS ACT

(§ 9-26-301 ET SEQ.)

Prefatory Note

The preparation of this Act was undertaken to extend the application of the basic policy embodied in the Uniform Stock Transfer Act and in Article 8 of the Uniform Commercial Code. That policy is to promote the free transfer of investment securities by making them negotiable and protecting bona fide purchasers and other innocent parties from adverse claims. The Uniform Gifts to Minors Act and the Uniform Act for Simplification of Fiduciary Security Transfers have extended that policy in particular situations to relieve those handling securities from burdensome duties of inquiry. The need for further legislation extending the policy to securities owned by minors has been recognized in Alabama, California, New York, Ohio and other states where statutes in this field have already been adopted.

The present Act is patterned on the existing statutes and on the prior uniform acts referred to. Drafts were submitted to counsel for the New York Stock Exchange and to appropriate Sections of the American Bar Association and were revised in the light of their comments. Persons handling securities are freed from any burden of inquiry as to the age of the holder. Unless such persons have actual knowledge, or unless written notice is received in the office acting in the transaction, they are exonerated from liability arising from the minority of the holder and the minor is denied the right to disaffirm or avoid the transaction. Thus a potential clog on all transfers of securities is removed, and rightful transfers by minors are relieved of a burden of delay and expense.

TITLE 12

LAW ENFORCEMENT, EMERGENCY MANAGEMENT, AND MILITARY AFFAIRS

UNIFORM CODE OF MILITARY JUSTICE (§ 12-64-101 ET SEQ.)

Prefatory Note

This Act provides for the administration of military justice in the National Guard not in Federal service. It is based directly on the United States Code of Military Justice and follows the Federal Code in all instances except those not considered suited for the National Guard not in Fed-

eral service. It is designed to facilitate the transition of the National Guard into Federal service and to familiarize it with the principles of the administration of military justice under which it will be required to operate when federalized.

Comment to Part X, codified as A.C.A. § 12-64-801 et seq.

There is embodied in Part X, codified as A.C.A. § 12-64-801 et seq., all of those offenses found in the United States Code of Military Justice with the exception of the more serious crimes, jurisdiction of which is reserved to civil courts. There are

of course many other possible offenses which might be added. However, it is believed that Section 1045 (A.C.A. § 12-64-844) of this Act, which is a general article, extends to most of those offenses not specifically provided for herein.

TITLE 15

NATURAL RESOURCES AND ECONOMIC DEVELOPMENT

UNIFORM CONSERVATION EASEMENT ACT (§ 15-20-401 ET SEQ.)

A.C.R.C. Notes. The Arkansas version of this act is different from the uniform law and does not follow the same section order. The comments set out below follow

the section order of the uniform law and, consequently, do not appear in A.C.A. order.

Prefatory Note

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certain common law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, the restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitted by the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under circumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real are present. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to maintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though Preservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take certain affirmative actions to preserve the property. In

each case, under the Act, the restrictions and obligations bind successors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1) (A.C.A. § 15-20-402(1)) and that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an interest in the subject matter (Section 1(2) (A.C.A. § 15-20-402(2))). The interest may be created in the same manner as other easements in land (Section 2(a) (A.C.A. § 15-20-404)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction (Section 3(a)(3) (A.C.A. § 15-20-409(a)(3))) if the possessor of the right is also a governmental unit or charity (Section 1(3) (A.C.A. § 15-20-402(3))).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants real and equitable servitudes in addition to those associated with easements. As statutorily modified, these three common law interests retain their separate existence as instruments employable for conservation and preservation ends. The second approach seeks to create a novel additional interest which,

although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the former to arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effect in Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering system. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity, particularly those held in gross. It is the intention to facilitate private grants that serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval adds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to become involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing such a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept the administrative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of conservation easement serving the public interest. Other types of easements, real covenants and equitable servitudes are enforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. Moreover, Section 1(2) (A.C.A. § 15-20-402(2)) of the Act restricts the entities that may hold conservation and preservation easements to governmental agencies and charitable organizations, neither of which is likely to accept them on an indiscriminate basis. Governmental programs that extend benefits to private donors of these easements provide additional controls against potential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which easement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricted properties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local property tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American legal system generally regards private ordering of property relationships as sound public policy. Absent conflict with constitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is the norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the values implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments (Section 4 (A.C.A. § 15-20-408)). For example, with the exception of the requirement of Section 2(b) (A.C.A. § 15-20-405)

that the acceptance of the holder be recorded, the formalities and effects of recording are left to the state's registry system; an adopting state may wish to establish special indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation easements. The Act provides that conservation easements have an unlimited duration unless the instruments creating them provide otherwise (Section 2(c) (A.C.A. § 15-20-406)). The relationship between this provision and the marketable title act or other statutes addressing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxa-

tion practices is not dealt with; for example, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state and local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions of the income, estate and gift tax laws which are applicable. Finally, the Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes.

Comment to § 1 (A.C.A. § 15-20-402)

Section 1 (A.C.A. § 15-20-402) defines three central elements: What is meant by a conservation easement; who can be a holder; and who can possess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within the definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the easement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of air or water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1) (A.C.A. § 15-20-402(1)).

A "holder" may be a governmental unit having specified powers (subsection (2)(i) (A.C.A. § 15-20-402(A))) or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place (subsection (2)(ii) (A.C.A. § 15-20-402(B))). The word "charitable", in Section 1(2) (A.C.A. § 15-20-402(2)) and (3) (A.C.A. § 15-20-402(3)), describes organizations that are charities according to the common law definition regardless of their status as exempt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3) (A.C.A. § 15-20-402(3)), 3(a)(3) (A.C.A. § 15-20-409(a)(3))). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4 (A.C.A. § 15-20-408). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be valid under other applicable law of the adopting state is left to the law of that state. (Section 5(c) (A.C.A. § 15-20-403(c)).)*

*The Arkansas version is different from the uniform act.

Comment to § 2 (A.C.A. §§ 15-20-404, 15-20-405, 15-20-406, 15-20-407)

Section 2(a) (A.C.A. § 15-20-404) provides that, except to the extent otherwise indicated in the Act, conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) (A.C.A. § 15-20-404) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) (A.C.A. § 15-20-408(2)) effectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments purporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without notice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection (b) (A.C.A. § 15-20-405) makes clear that neither a holder nor a person having a

third-party enforcement right has any rights or duties under the easement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate it in states whose case or statute law accords their courts that power in the case of easement. See Section 3(b) (A.C.A. § 15-20-409(b)). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes and may be held only by certain "holders." These limitations find their place comfortably within similar limitations applicable to charitable trusts, whose duration may also have no limit. Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived.

Obviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when the easement comes into being unless those owners join in the easement or consent to it. The easement property thus would be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d) (A.C.A. § 15-20-407).)

Comment to § 3 (A.C.A. § 15-20-409)*

Section 3 (A.C.A. § 15-20-409) identifies four categories of persons who may bring actions to enforce, modify or terminate conservation easements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners of interests in real property burdened by easements might wish to sue in cases where the easements also impose duties upon holders and these duties are breached by the holders. Holders and persons having third party rights of enforcement might obviously wish to bring suit to enforce restrictions on the

owners' use of the burdened properties. In addition to these three categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed conditions

affecting the property or its environs, because the holder of the conservation easement may cease to exist, or for other reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed conditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for responding to these vagaries. Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if they no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some states, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary adjustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The doctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problematic in many states.

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot be carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases to exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will not allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.

*The Arkansas version has added a subsection (c).

Comment to § 4 (A.C.A. § 15-20-408)

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends. Section 4 (A.C.A. § 15-20-408) addresses this goal by comprehensively identifying these defenses and negating their use in actions to enforce conservation or preservation easements.

Subsection (1) (A.C.A. § 15-20-408(1)) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor or his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it eliminates the requirement in force in some states that the holder of the easement must own an interest in real property (the "dominant estate") benefitted by the easement.

Subsection (2) (A.C.A. § 15-20-408(2)) also clarifies common law by providing that an easement may be enforced by an assignee of the holder.

Subsection (3) (A.C.A. § 15-20-408(3)) addresses the problem posed by the common laws recognition of easements that served only a limited number of purposes and its reluctance to approve so-called

"novel incidents." Easements serving the conservation and preservation ends enumerated in Section 1(1) (A.C.A. § 15-20-402(1)) might fail of enforcement under this restrictive view. Accordingly, subsection (3) (A.C.A. § 15-20-408(3)) establishes that conservation or preservation easements are not unenforceable solely because they do not serve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) (A.C.A. § 15-20-408(4)) deals with a variant of the foregoing problem. The common law recognized only a limited number of "negative easements" — those preventing the owner of the burdened land from performing acts on his land that he would be privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at common law might be imposed by conservation or preservation easements, subsection (4) (A.C.A. § 15-20-408(4)) modifies the common law by eliminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) (A.C.A. § 15-20-408(5)) addresses the opposite problem — the

unenforceability at common law of an easement that imposes affirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was viewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it obligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from an affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the burdened property that the holder would not have been privileged to perform absent the easement).

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the burdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of preservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement may agree to undertake restoration. In either case, the preservation easement would impose affirma-

tive obligations. Subsection (5) (A.C.A. § 15-20-408(5)) treats both interests as easements and establishes that neither would be unenforceable solely because it is affirmative in nature.

Subsections (6) (A.C.A. § 15-20-408(6)) and (7) (A.C.A. § 15-20-408(7)) preclude the touch and concern and privity of estate or contract defenses, respectively. Strictly speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the enforcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three classes of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of these classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defenses in Section 4 (A.C.A. § 15-20-408) is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by courts that might inadvertently confuse them with real covenants or equitable servitudes.

Comment to § 5 (A.C.A. § 15-20-403)*

There are four classes of interests to which the Act might be made applicable: (1) those created after its passage which comply with it in form and purpose; (2) those created before the Act's passage which comply with the Act and which would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly validated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or after the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those created before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-Act statutory or case law.

It is the purpose of Section 5 (A.C.A. § 15-20-403) to establish or confirm the validity of the first three classes of interests. Subsection (a) establishes the validity of the first class of interests, whether or not they are designated as conservation or preservation easements. Subsection (b) (A.C.A. § 15-20-403(b)) establishes the

validity under the Act of the second class. Subsection (c) (A.C.A. § 15-20-403(c)) confirms the validity of the third class independently of the Act by disavowing the intent to invalidate any interest that does not comply with other applicable law.

Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the fourth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in arguing that his property would be "taken" without just compensation were that interest subsequently validated by the Act. Subsection (b) (A.C.A. § 15-20-403(b)) addresses this difficulty by precluding retroactive application of the Act if such application "would contravene the constitution or laws of (the) State or of the United States." That determination, of course, would have to be made by a court.

*The Arkansas version of Section 5 is different from the uniform act.

TITLE 16

PRACTICE, PROCEDURE, AND COURTS

UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT (§ 16-4-101 ET SEQ.)

Commissioners' Prefatory Note

Civil litigation with interstate and international aspects is becoming an increasingly important element of judicial business. In many cases it is necessary to perform a procedural act, either with or without assistance from local officials, in a sister state or a foreign country. Conversely, domestic courts are being requested with greater frequency to render assistance to out-of-state tribunals and litigants. Unfortunately, existing law is frequently difficult to ascertain, inadequate, and ill-adjusted to conditions prevailing outside the forum state. The American Bar Association, recognizing the need for reform, recommended shortly after the Second World War that the President establish a Commission to investigate, and suggest measures for the improvement of, existing procedures. In 1952, the President approved this recommendation, and in 1958, the United States Congress enacted legislation to establish a Commission and Advisory Committee on International Rules of Judicial Procedure. Act of Sept. 2, 1958, 72 Stat. 1743. This Commission and its Advisory Committee, in cooperation with the Columbia Law School Project on International Procedure, has drafted several amendments to the Federal Rules of Civil and Criminal Procedure and Titles 18, 22 and 28 of the United States Code that are presently being considered for adoption.

The Uniform Interstate and International Procedure Act presents for adoption by the states a comprehensive code for use in state litigation with interstate or international incidents. It is designed to clarify, consolidate, and improve existing law, and supplants the Uniform Foreign Depositions Act, the Uniform Judicial Notice of Foreign Law Act, and the Uniform Proof of Statutes Act.

Article I, a modified version of the Uniform Extra-Territorial Process Act, which was before the Conference at its 1961 meeting, specifies authorized bases of personal jurisdiction over persons and entities that are not within the state at the time the action is commenced. Article II provides several alternative methods by which service may be effected outside the state. Article III is designed to facilitate the taking of depositions to obtain testimony, documents, and other tangible evidence outside the state for use in domestic litigation. Both Article II and Article III contain provisions for rendering assistance to tribunals and litigants outside the enacting state. Article IV resolves problems attendant upon the determination of the law of a governmental unit outside the forum state. Article V concerns proof of official records kept outside the state.

Comment to Section 1.01 (A.C.A. § 16-4-101(A))

The definition of "person" used in this section is derived in part from section 1-201(28)(30) of the 1958 official text of the Uniform Commercial Code. Certain modifications in the definition appearing in that act have been necessary in order to conform to the subject matter of this arti-

cle. Including a personal representative in the definition of a person permits acquisition of jurisdiction when acts of a deceased or an incompetent provide the basis of jurisdiction under this article.

In some cases the law of a state may require service on one or more specific

individuals in order for jurisdiction to be acquired over a person. See comment to section 2.03 (A.C.A. § 16-4-102).

The definition of "person" applies only to article I. In articles II through VI the word

"person" is used in its ordinary sense. In states defining the word "person" that definition will apply to articles II through VI.

Comment to Section 1.02 (A.C.A. § 16-4-101(B))

Section 1.02 (A.C.A. § 16-4-101(B)) sets forth bases for the exercise by a state of personal jurisdiction over a person who is outside the state as to any cause of action or claim for relief. In the situations dealt with in section 1.02 (A.C.A. § 16-4-101(B)) the defendant's enduring relationship or continuing contact with the state justifies the exercise of a wide range of jurisdiction.

Both the state where an individual is domiciled and the state where he maintains his principal place of business are authorized to exercise personal jurisdiction over him in all situations. This is a somewhat broader range of jurisdiction than states have customarily sought to exercise over individuals who maintain their principal place of business in the state.

The state where a legal entity was organized as well as the state where it maintains its principal place of business are permitted to exercise personal jurisdiction over the entity in all situations. This may constitute an expansion of the jurisdiction customarily exercised over an unincorporated association which maintains its principal place of business in the state. See Magruder & Foster, *Jurisdictions over Partnerships*, 37 Harv. L. Rev. 793, 828 (1924); Restatement (Second), *Conflicts* § 86 (Tent. Draft No. 3, 1956); Restatement, *Judgments* § 24 (1942); cf. Isaacs, *Amenability of Unions to Service of Process*, 32 N.Y.S. Bar Bull. 24 (1960). No change is made in the rules stating

which persons have to be served in order to acquire jurisdiction; thus, local law that all members of an unincorporated association must be joined and served or only named officers need be named and served remains unchanged. See, e.g., N.Y. Gen. Assoc. Law § 13 (president or treasurer).

In view of the increased possibility of acquiring personal jurisdiction under section 1.03 (A.C.A. § 16-4-101(C)), it is unnecessary to subject a corporation to suit on any cause of action or claim for relief in the many states in which it may be "doing business." In this respect section 1.02 (A.C.A. § 16-4-101(B)) restricts somewhat the jurisdiction some states have purported to exercise over foreign corporations which do business in the state but do not there maintain their principal place of business. The phrase "principal place of business" used in section 1.02 (A.C.A. § 16-4-101(B)) appears in the recent amendment to the United States Code covering diversity jurisdiction. See 28 U.S.C. § 1332 (1952).

"Cause of action" is the phrase used in the statutes, rules and cases of some states and is based upon the common law and Field Code; "claim for relief" is used in the Federal Rules of Civil Procedure and the law of those states based upon those rules. For purposes of the Uniform Interstate and International Procedure Act, they have the same meaning. See Comment to section 1.03(b) (A.C.A. § 16-4-101(C)(2)).

Comment to Section 1.03 (A.C.A. § 16-4-101(C))

Each of the subdivisions in subsection (1) will independently support jurisdiction. In some instances, a jurisdictional basis may be found under more than one subdivision. Thus, a defendant's liability may arise under subdivision (a) "transacting business" and either subdivision (c) "causing tortious injury by an act or omission in this state" or subdivision (d) "caus-

ing a tortious injury in this state by an act or omission outside this state." Each of the subdivisions will support a cause of action under any theory of law. For example, a claim arising from "transacting business" may sound in contract, tort, or quasi contract. See comment to section 1.03(b) (A.C.A. § 16-4-101(C)(2)).

The question whether a statute of limi-

tations should be tolled even though jurisdiction over the defendant can be acquired under this article is not treated in this act. Whether a statute is tolled under these circumstances will depend on an interpretation of its provisions.

Section 1.03(a)(1) (A.C.A. § 16-4-101(C)(1)(a)) is derived from the Illinois Act. Ill. Stat. Ann. c. 110, § 17(1)(a). This provision should be given the same expansive interpretation that was intended by the draftsmen of the Illinois Act and has been given by the courts of that state. See, e.g., *Berlemann v. Superior Distributing Co.*, 17 Ill. App.2d 522, 151 N.E.2d 116 (1958). See generally Jenner, Jr. & Tone, *Historical and Practice Notes*, Smith-Hurd Illinois Stat. Ann. c. 110 § 17 (1956), id. (1961 Supp.); Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. Rev. 599, 607-09 (1955). The "transaction of any business in a state" is employed as a jurisdictional basis by an ever increasing number of state statutes. Mich. Stat. Ann. §§ 27A.705, 27A.715, 27A.725, 27A.735; N.Y.C.P.L.R. § 302(a)(1) (effective Sept. 1, 1963); Tenn. Code Ann. § 20-220; cf. N.H. Rev. Stat. Ann. § 300:11; Wyo. Stat. Ann. § 17-44.

Section 1.03(a)(2) (A.C.A. § 16-4-101(C)(1)(b)) is derived from Mich. Stat. Ann. §§ 27A.705, 27A.715, 27A.725, 27A.735. Essentially similar provisions are Mont. R. Civ. Pr. 4B(1)(e); Wis. Stat. Ann. tit. 25, § 262.05. Broad statutes which base jurisdiction upon the entry into a contract "to be performed in whole or in part by either party in the state" are Minn. Stat. Ann. § 303.13; Vt. Stat. Ann. tit. 12, § 855; cf. N.C. Gen. Stat. § 55-145(1).

The North Carolina statute (§ 55-145(3)) bases jurisdiction upon "the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed..." This provision was held unconstitutional as applied to the facts of the case in *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956) and in *Putman v. Triangle Publications*, 245 N.C. 432, 96 S.E.2d 445 (1957). On the other hand, it was held constitutional in *Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959).

The constitutionality of section

1.03(a)(2) (A.C.A. § 16-4-101(C)(1)(b)) is supported by *WSAZ, Inc. v. Lyons*, 254 F.2d 242 (6th Cir. 1958); *Berlemann v. Superior Distributing Co.*, 17 Ill. App.2d 522, 151 N.E.2d 116 (1958); *Beck v. Spindler*, 256 Minn. 543, 99 N.W.2d 670 (1959); *S. Howes Co. v. W.P. Milling Co.*, 277 P.2d 655 (Okla. 1954); cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

Section 1.03(a)(3) (A.C.A. § 16-4-101(C)(1)(c)) applies when the tortious act or omission occurs in the state even though the resulting injury occurs elsewhere. The state where the tortious act or omission occurs will often be the most appropriate location for the trial of the action. *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951). For a similar approach, see Wis. Stat. Ann. tit. 25, § 262.05(3).

Section 1.03(a)(3) (A.C.A. § 16-4-101(C)(1)(c)) may have a narrower range of application than statutes which base jurisdiction upon the "commission of a tortious act" within the state (see, e.g., Ill. Stat. Ann. c. 110, § 17(1)(b); Me. Rev. Stat. Ann. c. 112, § 21(I)(B); N.Y.C.P.L.R. § 302(a)(2) (effective Sept. 1, 1963); N.C. Gen. Stat. § 55-145(4)), or upon the commission of a tort "in whole or in part" in the state. See, e.g., Minn. Stat. Ann. § 303.13(3); Vt. Stat. Ann. tit. 12, § 855. Some of these statutes have been interpreted to cover acts or omissions outside the state. See discussion of section 1.03(a)(4) (A.C.A. § 16-4-101(C)(1)(d)) below.

Section 1.03(a)(4) (A.C.A. § 16-4-101(C)(1)(d)) authorizes the exercise of jurisdiction when the tortious act or omission takes place without the state but the injury occurs within the state and there is some other reasonable connection between the state and the defendant. For a similar approach, see Wis. Stat. Ann. tit. 25, § 262.05(4). The rule is more restrictive than the Illinois statutes, as interpreted in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), and the Michigan statute (Mich. Stat. Ann. §§ 27A.705, 27A.715, 27A.725, 27A.735). A sufficient nexus exists if (a) the defendant regularly advertises his products or services in the state or (b) carries on some other continuous course of activity there or (c) derives

substantial revenue from goods used or consumed or from services rendered in the state. It is not necessary that this activity amount to the doing of business.

It should be noted that the regular solicitation of business or the persistent course of conduct required by section 1.03(a)(4) (A.C.A. § 16-4-101(C)(1)(d)) need have no relationship to the act or failure to act that caused the injury. No distinctions are drawn between types of tort actions.

In sustaining the exercise of jurisdiction over a defendant who has caused injury in the state by means of a tortious act done outside the state, the courts have often emphasized that the defendant had contacts with the state that bore no relation to the particular tort. See, e.g., *Green v. Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117 (S.D.Ind. 1962); *Sonnier v. Time*, 172 F. Supp. 576 (W.D.La. 1959); *Becker v. General Motors*, 167 F. Supp. 164 (D. Md. 1958); *Jenkins v. Dell Publishing Co.*, 130 F. Supp. 104 (W.D. Pa. 1955); *Gordon Armstrong Co. v. Superior Court*, 160 Cal. App.2d 211, 325 P.2d 21 (1958); *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W.2d 607 (1961); *Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959).

Section 1.03(a)(5) (A.C.A. § 16-4-101(C)(1)(e)) is similar to statutes found in several states. See, e.g., Ill. Stat. Ann. c. 110, § 17(1)(c); Me. Rev. Stat. Ann. c. 112, § 21(I)(C); N.Y.C.P.L.R. § 302(a)(3) (effective Sept. 1, 1963); Pa. Stat. Ann. c. 1, tit. 12, § 331. See *Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (Phil. Cty. Ct. 1938); cf. N.J.R. 4:4-4(i). See generally, Note, Ownership, Possession or Use of Property as a Basis of In Personam Jurisdiction, 44 Iowa L.Rev. 374 (1959). The provision is confined to actions arising from the ownership of an interest in, use or possession of real property. Although the Michigan and Wisconsin statutes (Mich. Stat. Ann. §§ 27A.705, 27A.715, 27A.725, 27A.735 (1962); Wis. Stat. Ann. tit. 25, § 262.05(6)) include the ownership, use or possession of personal property as a basis of jurisdiction this basis has been excluded because of the difficulties that might be posed in situations such as those involving stolen property, conditional sales and chattel mortgages.

Section 1.03(a)(6) (A.C.A. § 16-4-101(C)(1)(f)) is derived from the Illinois and Michigan Statutes. Ill. Stat. Ann. c. 110, § 17(1)(d); Mich. Stat. Ann. § 27A.705(4). The provision is placed in brackets because many states have similar and more explicit provisions in their insurance law. It is appropriate to treat this matter, which affects the insurance practices within the state, as part of the state's regulatory scheme for this industry. The power of the states in this area has been widely recognized. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

Not proposed for adoption are other special provisions better considered in connection with the substantive area of the law to which they relate. For example, the Michigan statute provides as a jurisdictional basis "Acting as a director, manager, trustee, or other officer of any corporation incorporated under the laws of, or having its principal place of business within, the state of Michigan." Mich. Stat. Ann. § 27A.705(6). A provision of this sort is of substantial importance in connection with shareholder derivative suits. It would most appropriately be placed with other statutes directly relating to corporations.

Section 1.03(b) (A.C.A. § 16-4-101(C)(2)) is derived from Ill. Stat. Ann. c. 110, § 17(3) cf. N.Y.C.P.L.R. § 302 (b) (effective Sept. 1, 1963).

The concept of cause of action or claim for relief should be broadly construed to cover an entire transaction so that, when possible, the entire dispute may be settled in a single litigation. Subdivision (b) is designed to prevent assertion of independent claims unrelated to any activity described in subdivision (a) of section 1.03.

A defendant may appear and consent to unlimited jurisdiction if he prefers to litigate all aspects of a related dispute. In states having a compulsory counterclaim rule, it may be desirable to provide that the defendant need not plead a counterclaim if jurisdiction is acquired under section 1.03. Cf. Proposed Amendments and Notes to Federal Rule 13, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts 18-19 (October, 1961).

Comment to Section 1.04 (A.C.A. § 16-4-101(D))

Section 1.04 (A.C.A. § 16-4-101(D)) explicitly authorizes service of process outside the state when personal jurisdiction

is based on this Article. See Uniform Interstate and International Procedure Act, Article II, *infra*.

Comment to Section 1.05 (A.C.A. § 16-4-101(E))

This provision is derived from Wis. Stat. Ann. tit. 25, § 262.19. The Wisconsin provision contains details on motion practice that are not appropriate for a uniform statute. Among the factors listed in the Wisconsin provision that may be relied upon under section 1.05 (A.C.A. § 16-4-101(E)) in determining whether a case should be heard in another jurisdiction are the following:

(a) amenability of the parties to personal jurisdiction in the state and in any alternative forum;

(b) convenience to the parties and witnesses of trial in the state and in any alternative forum;

(c) differences in conflict of laws rules applicable in the state and in any alternative forum; or

(d) any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

Possible conditions for granting the stay suggested in the Wisconsin provision are consent of the parties to suit in the alternative forum and waiver of reliance upon statutes of limitations. See generally, Foster, Jr. Revision Notes, Wis. Stat. Ann. tit. 25, § 262.19 (West, Supp. 1962).

Comment to Section 1.06 (A.C.A. § 16-4-101(F))

This Article does not purport to cover the bases of jurisdiction in a comprehensive or exhaustive fashion. The traditional bases of physical presence and of implied or actual consent are continued by section 1.06 (A.C.A. § 16-4-101(F)). And so too are quasi in rem and in rem jurisdiction.

Where residence is an accepted basis, the use of the word "domicile" in section 1.02 (A.C.A. § 16-4-101(B)) of this Article does not exclude residence as a basis. States that adopt the entire Act, including section 6.01 (A.C.A. § 16-4-105), should omit this section.

Comment to Section 2.01 (A.C.A. § 16-4-102(A))

Service beyond the territorial limits of the state may involve difficulties that cannot be obviated by existing provisions, especially when service is attempted in a foreign country. See generally Smit & Miller, *International Co-Operation in Civil Litigation — A Report on Practices and Procedures Prevailing in the United States* 40-48 (Milan 1961); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1040-43 (1961). Service within the borders of some countries, when attempted in connection with litigation pending elsewhere, may be considered a judicial, and therefore a "sovereign," act that is offensive to the policy or contrary to the law of these countries. See also Note, 49 Am. J. of Int'l L. 379 (1955). Further, the enforcement of a judgment in the country in which the service was made

may be embarrassed or prevented if the service did not comport with the law of that country.

By authorizing a series of alternatives when extra-territorial service is permitted by the law of the forum, section 2.01 (A.C.A. § 16-4-102(A)) permits accommodation to the policies and procedures of sister states and foreign countries. To make clear that due process notions remain applicable when service is made outside the state, a proviso has been inserted requiring that the service be reasonably calculated to give actual notice. See *Milliken v. Meyer*, 311 U.S. 457 (1940).

Service by personal delivery, permitted by section 2.01(1) (A.C.A. § 16-4-102(A)(1)(a)), is the manner of service that is not only traditionally preferred, but

also most likely to lead to actual notice. See, e.g., Ill. Rev. Stat. c. 110, § 16; Wash. Rev. Code § 4.28.180. Specific provision for this type of service is desirable since some states fail to authorize service by personal delivery outside the state. E.g., Ark. Stat. §§ 27-339, 27-340; Calif. Ins. Code § 1612; N.Y. Veh. & Tfc. L. § 253.

Section 2.01(2) (A.C.A. § 16-4-102(A)(1)(b)) permits extraterritorial service to be made in the manner prescribed by the law of the place in which the service is effected. Provision for this manner of service is desirable since a foreign country is less likely to object to a manner of service prescribed by its own law than to other manners of service and since a number of foreign countries recognize foreign judgments only if they are based on service made in accordance with their laws. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 537 (1953); Smit, *supra* at 1041-42; Inter-American Judicial Committee, *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures* 20 (1952). The chances of avoiding foreign objections and of obtaining foreign recognition of the domestic judgment will ordinarily be enhanced even further if, as permitted by section 2.02 (A.C.A. § 16-4-102(B)), the service pursuant to section 2.01(2) (A.C.A. § 16-4-102(A)(1)(b)) is made by a person designated by a court or the law of the foreign country. *Ibid.* However, the flexible provisions of section 2.02 (A.C.A. § 16-4-102(B)) do not exclude the possibility that service pursuant to section 2.01(2) (A.C.A. § 16-4-102(A)(1)(b)) be effected by another person. Careful study of the law of the foreign country should, of course, precede recourse to any manner of service.

Section 2.01(3) (A.C.A. § 16-4-102(A)(1)(c)), permitting service by mail requiring a signed receipt, provides for an inexpensive and expeditious manner of service. Since service by this form of mail requires activity within a foreign country only by that country's own postal authorities, it is unlikely to be forbidden abroad. And since service by this form of mail is reasonably calculated to lead to actual notice, constitutional problems are also avoided. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Several states provide for service by registered mail. See, e.g., Ariz. R. Civ. Pr. 4 (e)(2)(a);

Hawaii Rev. Laws §§ 230-31, 230-32; Minn. Stat. Ann. § 303.13; Ohio Rev. Code § 3105.07. To insure that the documents reach the person to be served, section 2.01(3) (A.C.A. § 16-4-102(A)(1)(c)), requires that the mail be addressed to the person to be served and that a form of mail requiring a signed receipt to be used. Both ordinary registered and certified mail and registered and certified mail, return receipt requested, meet the requirements of section 2.01(3) (A.C.A. § 16-4-102(A)(1)(c)). Certified mail, however, can be used only within the United States, its possessions and territories, and the careful process server will ordinarily employ registered or certified mail, return receipt requested, since this type of mail provides the most certain and efficient method of obtaining a signed receipt. Subsection (b) (A.C.A. § 16-4-102(A)(2)) of this section, requiring that proof of service made pursuant to section 2.01(3) (A.C.A. § 16-4-102(A)(1)(c)) shall include a receipt signed by the addressee or other satisfactory evidence of delivery, provides an additional safeguard to insure that the mail actually reaches the addressee.

Recourse to service under section 2.01(4) (A.C.A. § 16-4-102(A)(1)(d)) will generally be necessary only in the case of service in a foreign country. A letter rogatory is a customary method for service outside the state in many parts of the world. See *In re Letters Rogatory Out of First Civil Court of City of Mexico*, 261 Fed. 652 (S.D.N.Y. 1919); 44 Colum. L. Rev. 72 (1944); Note, 58 Yale L.J. 1193 (1949). In some countries, service in aid of litigation pending elsewhere can be accomplished only upon request to the foreign court, which in turn directs the service to be made. See Jones, *supra* at 537; Longley, *Serving Process, Subpoena and Other Documents in a Foreign Country*, Proc. A.B.A., Sec. of Int'l & Comp. L. 34, 35 (1959); Smit, *supra* at 1041-42. When an examination of the law of the place in which the service is to be made indicates that the manners of service provided for in the other subsections may be objectionable, it is advisable for counsel to resort to section 2.01(4) (A.C.A. § 16-4-102(A)(1)(d)).

Section 2.01(5) (A.C.A. § 16-4-102(A)(1)(e)) adds flexibility by permitting the court to tailor the manner of service to fit the necessities of the particular case.

Subsection (b) (A.C.A. § 16-4-102(A)(2)) is intended to facilitate proof of service outside the state. In addition to the more traditional forms of return, proof of service in accordance with the law of the place of service is permitted. This is a desirable alternative because in many countries foreign process servers, unaccustomed to the form or requirement of service prevalent in this country, have on occasion been unwilling to execute an affidavit of service. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 537 (1953); Longley, *supra* 34, 35. Proof of service as directed by order of the court is permitted as a corollary to the

manner of service permitted by section 2.01(5) (A.C.A. § 16-4-102(A)(1)(e)). The second sentence in the subsection is designed to insure that there be proper proof of delivery when service is made by mail under subsection (a)(3) (A.C.A. § 16-4-102(A)(1)(c)). On the type of evidence of delivery that may be satisfactory to a court when a return receipt is unavailable, see *Aero Associates, Inc. v. La Metropolitana*, 183 F. Supp. 357 (S.D.N.Y. 1960).

The definition of "person" in section 1.01 (A.C.A. § 16-4-101(A)) is not applicable to articles II through VI. See comment to section 1.01 (A.C.A. § 16-4-101(A)).

Comment to Section 2.02 (A.C.A. § 16-4-102(B))

Section 2.02 (A.C.A. § 16-4-102(B)) is intended to provide the party attempting service outside the state with an extensive group of persons eligible to make the service. In a foreign country, this will increase the possibility that the plaintiff will be able to find a person who can proceed unimpeded; it also may improve the chances of recognition of the judgment in the country of service. Under many state statutes, service can only be made by designated state or federal officials or special appointees, who, because directly con-

nected with another "sovereign," may be offensive to the foreign country. See, e.g., Wyo. R. Civ. Pr. 4(c)(3). In addition, existing Department of State regulations do not permit our foreign service officials to serve process except in some narrowly defined cases. 22 C.F.R. §§ 92.85, 92.86, 92.92 (1958). Furthermore, when service is to be made outside the state, whether in a sister state or a foreign country, service by an official of the forum state is ordinarily cumbersome and expensive.

Comment to Section 2.03 (A.C.A. § 16-4-102(C))

Section 2.03 (A.C.A. § 16-4-102(C)) makes clear that when the law of the enacting state requires service on an individual in addition to, or in lieu of, service on a particular party, that requirement must be satisfied when service is made under this Article. Frequently, a requirement of this nature is imposed when one of the parties is an infant, incompetent, or

an association or business organization. E.g., Wis. Stat. Ann. § 262.06(2). If service is to be made in a foreign country, it would also be advisable, for purposes of enforcing the judgment in that country, to comply with the service requirements of the foreign country as well as with the requirements of this section.

Comment to Section 2.04 (A.C.A. § 16-4-102(D))

Section 2.04(a) (A.C.A. § 16-4-102(D)(1)) authorizes judicial assistance to litigants and tribunals in sister states and foreign countries in making service within the enacting state. The bracketed matter is designed to give the enacting state a choice between authorizing all of its courts to render assistance or restricting these functions to one or more designated

courts. The term "tribunal" is intended to encompass any body with judicial functions. A request for assistance in a letter rogatory will generally emanate from outside the United States. Under the law of a fair number of foreign countries, service abroad must or may be made by a letter rogatory addressed to a tribunal in the country in which the service is to be made.

See 44 Colum. L. Rev. 72 (1944). Both federal and state courts have been reluctant to comply with a letter rogatory containing a request for local service. See *In re Letters Rogatory Out of First Civil Court of City of Mexico*, 261 Fed. 652 (S.D.N.Y. 1919); *Matter of Romero*, 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. 1907).

Section 2.04(b) (A.C.A. § 16-4-102(D)(2)) re-affirms the existing freedom to make service within a state of the United States on behalf of litigation pending elsewhere as long as the particular manner employed does not constitute a disturbance of

the peace or other violation of law. See *McCusker*, *Some United States Practices in International Judicial Assistance*, 37 Dep't of State Bull. 808 (1957).

Section 2.04(c) (A.C.A. § 16-4-102(D)(3)), providing that service under section 2.04 (A.C.A. § 16-4-102(D)) does not, of itself, require the recognition of an adjudication of the requesting tribunal, is designed to eliminate the objection that this section could be read to require a judgment based on such service be given greater effect than a judgment based on service made without judicial assistance.

Comment to Section 2.05 (A.C.A. § 16-4-102(E))

Section 2.05 (A.C.A. § 16-4-102(E)) preserves any method for effecting extraterritorial service under the statutes, court rules, or judicial decisions of the enacting state. Many enactments and court decisions interpreting state statutes authorize such service. E.g., *Me. Rev. Stat. Ann. c. 22, § 70*; *Minn. Stat. Ann. § 303.13*; *Wis. Stat. Ann. § 262.06*; *Chapman v. Superior*

Court, 162 Cal. App.2d 421, 328 P.2d 23 (Dist. Ct. App. 1958); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing v. Bush*, 260 S.W.2d 900 (Tex. Ct. Civ. App. 1953). Also preserved are any existing provisions for rendering assistance to foreign tribunals and litigants. States that adopt the entire Act, including section 6.01 should omit this section.

Comment to Section 5.01 (A.C.A. § 16-4-104(A))

With the exception of minor changes in wording, section 5.01 (A.C.A. § 16-4-104(A)), which relates to the authentication of official records kept in the United States, corresponds to Proposed Amended Rule 44(a) for the Federal Rules of Civil Procedure. Present Federal Rule 44(a) or its equivalent exists in many states. E.g., *Alaska R. Civ. Pr. 44(a)*; *Colo. R. Civ. Pr. 44(a)*. Section 5.01 (A.C.A. § 16-4-104(A)) provides a more accurate description of a "domestic" record than does the present

Federal Rule. It is not necessary that the record be a United States official record for section 5.01 (A.C.A. § 16-4-104(A)) to apply. All that is necessary is that the original be in one of the places enumerated in this section. Thus, for example, a record of a government in exile that is situated in this country may qualify under this section as well as section 5.02 (A.C.A. § 16-4-104(B)). Cf. *Banco de España v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940).

Comment to Section 5.02 (A.C.A. § 16-4-104(B))

Section 5.02 (A.C.A. § 16-4-104(B)) provides flexibility in the proof of foreign official records. Because the term "legal custody," the formulation commonly found in existing state legislation, is inapposite to records kept in foreign countries in which the concept frequently is unknown, it has been eliminated, and the required capacity of the attesting officer or person is described in functional terms. This will enable any person who is authorized by the law of the foreign country to prepare

and attest a copy even though he may not be charged with responsibility for maintaining the records.

One of the difficulties with present certification requirements is that they usually require one person, a United States foreign service officer, to certify to the genuineness of the attesting person's signature, the lawful incumbency of the office he purports to hold, and his authority. See *Smit & Miller, International Co-Operation in Civil Litigation — A Report on*

Practices and Procedures Prevailing in the United States 66 (Milan 1961); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1063 (1961). Section 5.02 (A.C.A. § 16-4-104(B)) eliminates the certification as to authority, because United States consular officers are ordinarily unable to determine the complex issues of foreign law that are involved in the question of authority. Section 5.02 (A.C.A. § 16-4-104(B)) also alleviates the difficulties encountered under the usual certification requirements by permitting use of the chain-certification method. Under the chain-certification method, the original attestation is accompanied by a certification by another local official whose certification is in turn followed by that of an official of higher rank. The process continues until an official is reached about whom the consular official knows enough to permit him to issue the ultimate certification. The section also permits the "final certification" to be prepared by any one of a number of designated United States foreign service officers or by any diplomatic or consular official of the foreign country who is assigned or accredited to the United States. It may be based on information on record at the consulate or any other information deemed reliable by the certifying officer.

To afford as much flexibility as possible, the person preparing the "final certification" may certify not only the last, but any certificate that appears in the chain. In some cases, the person preparing the final certification may have the required information in regard to the official position and the genuineness of the signature of some intermediate foreign certifying official rather than the proceeding official. Then the person preparing the final certification is therefore permitted to issue a certification as to the attesting person or of any foreign official in the chain of certificates.

Although section 5.02 (A.C.A. § 16-4-104(B)) facilitates proof of foreign official records, it is recognized that in some situations compliance may nevertheless be difficult or even impossible. The difficulty may be due to the fact that there is no American consul in the country in ques-

tion, to a lack of co-operation on the part of the foreign officials, or to the peculiarities that presently exist or may arise in the future in the law or practice of any one of more than a hundred foreign countries and their states and political subdivisions. Therefore, section 5.02 (A.C.A. § 16-4-104(B)) provides the court with discretionary power to admit a document that is uncertified, although attested, or a summary of the record rather than a copy. See Report of the Committee on Comparative Civil Procedure and Practice, Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130-31 (1952); Model Code of Evidence §§ 517, 519.

This provision represents a departure from the common law rule and many existing statutes, which require a literal copy of the record. See *Russo v. Metropolitan Life Ins. Co.*, 125 Conn. 132, 3 A.2d 844 (1939). See also Schlesinger, *Comparative Law* 56, n.1 (2d ed. 1959). Since the summary is prepared by a disinterested governmental official, there is still a high probability that the substance of the document has been set forth accurately. Further, some nations will issue only extracts or summaries of certain official records. See *United States v. Grabina*, 119 F.2d 863 (2d Cir. 1941). To insure that a party procures the best caliber of evidence available, a showing of good cause is required.

The requirement that reasonable opportunity be given to all parties to examine in the authenticity and accuracy of an attested but uncertified copy or a summary is designed as a procedural safeguard. If this opportunity has not been given, the document may not be admitted. What constitutes reasonable opportunity will be determined by the court on the basis of the posture of the litigation and the importance of the document. Moreover, the document may be inspected by the opponent, his counsel, and experts. The latter may include not only foreign law experts, but also experts on questioned documents, so that forgeries may be detected by chemical examination of paper and ink.

The definition of "person" in section 1.01 (A.C.A. § 16-4-101(A)) is not applicable to articles II through VI. See comment to section 1.01 (A.C.A. § 16-4-101(A)).

Comment to Section 5.03 (A.C.A. § 16-4-104(C))

Section 5.03 (A.C.A. § 16-4-104(C)) modifies the Uniform Proof of Statutes Act, adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1920. Its inclusion in article V is designed to provide an alternative method for proving the written law and the executive, legislative, and judicial acts of any jurisdiction. Accordingly, it supplements sections 5.01 (A.C.A. § 16-4-104(A)) and 5.02 (A.C.A. § 16-4-104(B)) of this article and

affords a simplified method for proving certain classes of documents that generally are published and the contents of which are common knowledge. Cf. Calif. Code Civ. Pr. § 1918. Neither this section nor the Uniform Proof of Statutes Act is intended to apply to secondary material. See *Birch v. Birch*, 136 Cal. App. 2d 619, 289 P.2d 53 (1955). The changes in wording from the Uniform Proof of Statutes Act were required to take into account the overall scheme of article V.

Comment to Section 5.04 (A.C.A. § 16-4-104(D))

This section is similar in content to Federal Rule 44(b) and to provisions found in many states. E.g., Tex. Stat. Ann. Art. 3731a, § 5. It represents a modification of the common law literal copy rule. When the written statement relates to the lack of a domestic record, it must be authenticated in accordance with the requirements of section 5.01 (A.C.A. § 16-4-104(A)). When the statement relates to

the lack of a record in a foreign country, the requirements in section 5.02 (A.C.A. § 16-4-104(B)) for a summary, including giving reasonable notice to the parties, must be satisfied. As in the case of the summary, the high probability of accuracy when a foreign official certifies to the nonexistence of a record in his files, makes section 5.04 (A.C.A. § 16-4-104(D)) a desirable modification of prior practice.

Comment to Section 5.05 (A.C.A. § 16-4-104(E))

Section 5.05 (A.C.A. § 16-4-104(E)) preserves any method for the proof of foreign official records authorized by statute, treaty, or the rules of evidence. Thus, it is open to a litigant to prove an official record by the testimony of a person who has examined the original. Cal. Code Civ. Pr. § 1907; Mich. Stat. Ann. § 27.865; Tex. Stat. Ann. Art. 3731a, § 6. In addition, it authorizes the use of methods

authorized by various Consular Conventions between the United States and foreign countries. E.g., Article X, Consular Convention with Italy, May 8, 1878, T.S. No. 178 (Dep't State 1878), 20 Stat. 725. See *Russo v. Metropolitan Life Ins. Co.*, 125 Conn. 132, 3 A.2d 844 (1939). States that adopt the entire act, including section 6.01 (A.C.A. § 16-4-105) should omit this section.

Comment to Section 6.01 (A.C.A. § 16-4-105)

This section is a comprehensive savings clause that can be used in a state adopting the entire act in lieu of section 1.06 (A.C.A. § 16-4-101(F)), 2.05 (A.C.A. § 16-4-102(E)), 3.03, 4.04 and 5.05 (A.C.A.

§ 16-4-104(E)). For additional material explaining the necessity for this savings clause, see the comments to those sections.

UNIFORM RULES OF EVIDENCE (§ 16-41-101)

Prefatory Note

Much time has been spent by the sages and votaries of the Law of Evidence in an effort to clarify it and to supply us with the reasons for and the logic of the Rules of Evidence. Wigmore, in his Preface to the first edition of his monumental work on the subject, said:

"If we are to save the law for a living future, if it is to remain manageable amidst the sprawling mass of rulings and statutes which stand increasingly to clog its simplicity, we must rescue these reasonings from forgetfulness."¹

Wigmore acknowledges, however, that Sir James Stevens had another solution. He said:

"My evidence bill would be a very short one; it would consist of a rule, to this effect: 'All Rules of Evidence are hereby abolished.'"²

In 1923 the American Law Institute carefully considered the possibility of restating the Law of Evidence. It was, however, the unanimous decision of the Council of the Institute that such a restatement should not be undertaken. There was a realization that conflicts in the case law of the several states and the frequent confusion of decisions in a state tended to make a restatement of the dominant law of the United States very difficult if not impossible. However, we are told that the principal reason for the Council abandoning the idea of the restatement of the Law of Evidence was that the Rules of Evidence, themselves, in numerous and important instances were so defective that instead of being a means of developing the truth they tended to suppress it.³

The Federal Rules of Civil Procedure became effective September 16, 1938.⁴ Twenty-one of these rules as the rules were promulgated dealt with evidentiary matters. They are still in effect. It was in 1938 that Attorney General Mitchell suggested the formulation of Rules of Evidence by some other advisory agency "and then promulgation of the rules by the Supreme Court."⁵

In 1939, under a grant of the Carnegie

Foundation, work commenced on the Model Code of Evidence by the American Law Institute. Edmund P. Morgan of the Harvard Law School was named reporter and John Henry Wigmore was Chief Consultant. The active consultants included judges, litigation lawyers, and teachers. The Model Code of Evidence was promulgated by the American Law Institute in 1942.⁶

In 1948 the Committee on Scope and Program of the National Conference of Commissioners on Uniform State Laws (NCCUSL) determined that the Law of Evidence is a proper field for a uniform act. In 1949, the American Law Institute referred its Model Code of Evidence to the Conference for "study and, if appropriate, redrafting." In 1953, the NCCUSL promulgated the Uniform Rules of Evidence. While the Model Code of Evidence was the basic document upon which the rules were based, in those instances where it seemed that the departure from traditional and generally prevailing common law and statutory rules of evidence were too far-reaching and drastic for acceptance by the Bar, modifications were made by the Uniform Rules.⁷

Nevertheless, the general policy of the draftsmen for both works carried the subjects in the form of rather broad general rules in contrast to Wigmore's policy of voluminous detail. Both of these compilations had foundations of careful research by the best students of the Law of Evidence prior to official promulgation. Both the Model Code and the Uniform Rules had been examined, criticized, and tested by the litigation bar.

Some progress was made. Kansas adopted the Uniform Rules verbatim. In some states, portions of the Uniform Rules were adopted by statute and in others by judicial decision, but the result was not satisfactory.

In 1956 the Law Revision Committee of the State of California commenced a detailed study of the Uniform Rules of Evidence. Nine pamphlets with recommenda-

tions were distributed to the California lawyers between 1962 to 1964. In 1965 the California Evidence Code was adopted by that state.⁸

Substantially the same thing occurred in New Jersey. In 1967 the Uniform Rules of Evidence with modifications were adopted by the Supreme Court of New Jersey.⁹ In the New Jersey compilation, the numbering of the New Jersey rules follow, except where otherwise noted, the numbers of the Uniform Rules.

The Judicial Conference of the United States in 1961 approved a committee proposal to establish an Advisory Committee on Rules of Evidence. The Judicial Conference expressed the view that the objective of developing uniform rules was meritorious and decided that the proposal deserved "serious study as to its advisability and feasibility" and that, "If resolved favorably, Uniform Rules of Evidence for Federal Courts should, in due course, be promulgated." This resulted in the publication in February of 1962 of what has been called the "Feasibility Study" of the special committee. The committee concluded that the formulation of Uniform Rules of Evidence for Federal Courts was both "feasible and desirable."¹⁰

As a result of the Feasibility Study, a distinguished committee was appointed by the Judicial Conference to draft Rules of Evidence for the Federal Courts, and Professor Edward W. Cleary, of Arizona State University, was named reporter. The committee published its final draft in January of 1969. Revisions were made and in due course the Rules were sent to the Supreme Court. On November 20, 1972, an order was entered authorizing the Chief Justice to transmit the same to Congress as provided by law.¹¹ Justice Douglas dissented.

Several members of Congress objected to portions of the draft submitted by the Court. Accordingly, Congress suspended the effective date of the Rules and after extensive hearings held in both houses, P.L. 93-595 was enacted. This contains, for the most part, the Supreme Court draft, but with changes, the most significant of which was the deletion of the substantive provisions of article V from the Federal Rules.

It became clear that work on the Federal Rules of Evidence, the California and New Jersey studies rekindled a national

interest in the subject. The NCCUSL appointed a special committee on Rules of Evidence and the committee was charged with responsibility of conforming so far as practicable the Uniform Rules with the Federal Rules of Evidence when these were finally adopted for use in Federal Courts.

We believe uniformity in the Law of Evidence is desirable. To conform state and federal practice is to require a lawyer to learn one set of rules instead of two. The lawyer will better serve the public in whichever of these forums he may be litigating. Uniformity also discourages forum-shopping. It is difficult for a litigant to understand that his cause may be won or lost depending on the court or state in which the action may be tried. Finally, it seems, that to get genuine reform in the Law of Evidence it is necessary that attention be focused on special areas and special problems. We have seen that the case-by-case approach produces confusion.

The Uniform Rules of Evidence (1974) reflect closely P.L. 93-595. The section numbers conform to their federal counterparts, and the division of subjects into 11 articles is likewise the same. These mechanical aids are most important as they make readily accessible the thorough and careful notes of the Federal Rules Committee as well as the congressional reports.¹² Future annotations will also be easily located. The Rules are thus arranged to facilitate use by courts and litigating lawyers.

One final word. Adopting jurisdictions that have rules of procedure patterned after the Federal Rules of Civil Procedure will need to make adjustments in those rules of procedure insofar as they deal with evidentiary matters. See, for example, Federal Rules of Civil Procedure 30(c), 32(c), 43(b)(c), 44.1.

¹WIGMORE, EVIDENCE, Introduction (Vol. 1, 3rd ed. pg. XIV).

²Ibid.

³A.L.I., MODEL CODE OF EVIDENCE, 308 US 645; Cong. Rec., vol. 83 pt. 1, pg. 13, Exec. Comm. 905; H Doc. 460, 75th Cong.

⁴A.L.I., MODEL CODE OF EVIDENCE, Introduction, VII-VIII (1942).

⁵"A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS" by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1962). Hereafter cited as Feasibility Study.

⁶A.L.I., MODEL CODE OF EVIDENCE, Introduction, VIII (1942).

⁷UNIFORM RULES OF EVIDENCE, Prefatory Note, pg. 161.

⁸Stat. of California, ch. 299 (1965).

⁹Order Supreme Court of New Jersey, June 6, 1967.

¹⁰Feasibility Study.

¹¹Title 18 U.S.C. § 3771 and Title 18 §§ 2072, 2075.

¹²The House Report No. 93-650, November 15, 1973 (To accompany H.R. 5463); Senate Report (Judiciary Committee) No. 93-1277, October 11, 1974 (To accompany H.R. 5463); House Conference Report No. 93-1597, December 14, 1974 (To accompany H.R. 5463).

Comment to Rule 104(b) (A.C.A. § 16-41-101, Rule 104(b))

The phrase, "or in the court's discretion subject to" preserves the court's control of the order of proof as provided in Rule 611(a) (A.C.A. § 16-41-101, Rule 611(a)).

Comment to Rule 105 (A.C.A. § 16-41-101, Rule 105)

This rule is not intended to affect the power of a court to order a severance or a separate trial of issues in a multi-party case.

Comment to Rule 106 (A.C.A. § 16-41-101, Rule 106)

A determination of what constitutes "fairness" includes consideration of completeness and relevancy as well as possible prejudice.

Comment to Rule 301 (A.C.A. § 16-41-101, Rule 301)

The reasons for giving this effect to presumptions are well stated in the United States Supreme Court Advisory Committee's Note, 56 F.R.D. 183 (1972).

Comment to Rule 302 (A.C.A. § 16-41-101, Rule 302)

Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 (A.C.A. § 16-41-101, Rule 302) is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied.

Comment to Rule 502(c) (A.C.A. § 16-41-101, Rule 502(c))

Canon 4 of the Code of Professional Responsibility requires the lawyer to claim the privileges and not disclose confidential communications.

Comment to Rule 503 (A.C.A. § 16-41-101, Rule 503)

Language in brackets should be included if it is desired to provide a Physician-Patient Privilege.

Comment to Rule 601 (A.C.A. § 16-41-101, Rule 601)

This repeals the “deadman’s statute.” We recommend this. If it is desired to retain the deadman’s statute a sentence should be added recognizing the exception provided in the local “deadman’s statute.”

Comment to Rule 803 (A.C.A. § 16-41-101, Rule 803)

In jurisdictions that enact the Uniform Parentage Act the words “parentage” should be substituted for the word “legitimacy” in Rules 803(11) (A.C.A. § 16-41-101, Rule 803(11)), 803(19) (A.C.A. § 16-41-101, Rule 803(19)).

Comment to Rule 804 (A.C.A. § 16-41-101, Rule 804)

In jurisdictions that enact the Uniform Parentage Act, the word “parentage” should be substituted for the word “legitimacy” in Rule 804(b)(4)(i) (A.C.A. § 16-41-101, Rule 804(b)(4)(i)). Rule 804(b)(5) (A.C.A. § 16-41-101, Rule 804(b)(5)) may be included by states that approve the recommendations of the U.S. Supreme Court Advisory Committee. See Advisory Committee notes.

Comment to Rule 1003 (A.C.A. § 16-41-101, Rule 1003)

It is not intended that this Rule will dispense with requirements for explaining the reasons a duplicate is being tendered in lieu of an original in any situation where the absence of the original might suggest that it is no longer effective or has been destroyed with an intent to revoke. The distinction between admission into evidence and admission to probate of wills is not abrogated by the Rule.

Comment to Rule 1101 (A.C.A. § 16-41-101, Rule 1101)

The Uniform Rules of Criminal Procedure change the preliminary examination to a detention hearing. This terminology is used in Rule 1101(b)(3) (A.C.A. § 16-41-101, Rule 1101(b)(3)).

**UNIFORM RENDITION OF PRISONERS AS
WITNESSES IN CRIMINAL
PROCEEDINGS ACT**

(§ 16-43-301 ET SEQ.)

Commissioners' Prefatory Note

In 1931, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. This Act was revised in 1936, and has since been enacted by virtually all the States. It has been a useful tool for law enforcement officials in the field of interstate crime control.

In the spring of 1955, the Attorney General of the State of New York ruled in an official opinion from his office that this Uniform Act did not cover the rendition as a witness in another State of a prisoner confined in a penal institution in the State of New York. His ruling followed a request from another State that a prisoner held in New York State be delivered as a witness, and because of the ruling, the request was not granted.

As a result, the State of New York, by Chapter 836 of its Acts of 1956, enacted a special law to cover the delivery of one of their prisoners to another State as a witness.

Subsequently, the Council of State Governments polled the National Association of Attorneys General to get the reaction of individual States as to the desirability of similar legislation in other States. Most of the replies received indicated that such legislation would be desirable. Accordingly, the Council of State Governments drafted a proposed Act modeled upon the New York State Law enacted in 1956.

The Council of State Governments suggested the subject to the National Conference of Commissioners on Uniform State Laws. The Executive Committee of the National Conference approved the recommendation that a special committee be

appointed to draft a Uniform Act on Rendition of Witnesses in Penal Institutions, with the suggestion that the Committee also consider the question as to whether the existing Act should be amended or a separate Act drawn.

That action of the Executive Committee was taken at the Conference in Dallas in 1956. Subsequently, the Council of State Governments turned over to the Executive Secretary of the National Conference its complete file on this subject matter, and the President of the National Conference appointed a Special Committee as directed.

The Committee submitted a bill to the 1957 Conference held in New York City. Several weeks before the Conference, the Executive Committee, by a mail poll, had waived the requirement that a bill must be considered by at least two Conferences before it may be submitted to a vote of the States. At the 1957 Conference of the Commissioners, the bill received extended consideration at two sessions and was approved by the Conference for submission to the States.

The desirability of uniformity among the States as to such legislation is clear. This is a reciprocal Act, as was the earlier Uniform Act to Secure the Attendance of Witnesses From Without a State. It involves a delicate relationship among the States since it requires the entrusting of a prisoner in a penal institution to another State. The uniformity of legislative enactments is therefore strongly desirable and even necessary in order that the requests for and the rendition of a prisoner as a witness may be similarly performed in all States.

**UNIFORM ACT TO SECURE THE ATTENDANCE OF
WITNESSES FROM WITHOUT THE STATE
IN CRIMINAL CASES**

(§ 16-43-401 ET SEQ.)

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commentaries may be ordered from them at a cost of \$3.00 at 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.

Prefatory Note

1936 Revision

At its annual meeting in Boston in August, 1936, the Conference approved two significant changes of substance and several minor changes of form in this Uniform Act. The Uniform Act as originally adopted had been subject to criticism on the ground that it provided for the compulsory attendance of witnesses only when a criminal action was pending. It was pointed out that occasionally the ability to secure a warrant for arrest or an indictment before a Grand Jury may depend upon the testimony of witnesses outside the state. Accordingly, the first important change adopted in 1936 extends the application of the act so as to provide for the possibility of securing the attendance of witnesses in connection with Grand Jury proceedings as well as in criminal cases.

The second major change approved by

the Conference in 1936 was to provide that, when expedient, a witness may be arrested, held in custody, and delivered over to an officer of the requesting state.

This act should be adopted by every state. Its adoption will facilitate the administration of the criminal law. Officers engaged in the enforcement of criminal laws have long contended that there should be some statutory authority for securing the attendance of a witness from without the state in which the criminal proceeding is pending.

It is worthy of note that The Interstate Commission on Crime, at its annual meeting in Boston, in August, 1936, approved this Uniform Act in the form in which it is here printed, and is cooperating with the Conference in attempting to secure its adoption in all of the states.

1931 Act

The National Conference of Commissioners on Uniform State Laws at its Conference in Atlantic City in September, 1931, after careful consideration, adopted the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases. The act was thereafter approved by the American Bar Association.

For the past four years various drafts of an act on this subject were before the conference for consideration. During this time, and before the act was finally adopted, the American Law Institute in the preparation of its Code of Criminal Procedure prepared a tentative draft of a

chapter on this subject. Through conferences of committees representing the American Law Institute and the National Conference of Commissioners on Uniform State Laws an act was agreed upon which was thereafter adopted by both organizations. Hence this act will be found as a chapter in the Code of Criminal Procedure referred to above.

There are now [1931] ten states that have statutes providing for the securing of the attendance of witnesses from other states in criminal prosecutions. They are Connecticut, Iowa, Maine, Massachusetts, New Hampshire, New York, Rhode Island, South Dakota, Vermont and Wisconsin.

The statutes in question apply, in Connecticut to any "criminal prosecution"; in Iowa, South Dakota and Wisconsin to a "criminal action"; in Maine and Massachusetts to a "criminal case," and in New Hampshire, Rhode Island and Vermont to a "criminal cause."

The statutes in Connecticut, New Hampshire and Vermont provide unconditionally for the summoning of any person in the state who is wanted as a material witness in any other state. In Iowa, South Dakota and Wisconsin the statutes provide that this may be done if the state asking for the witness has a similar statute. In Maine and Rhode Island the statutes provide for the summoning of witnesses wanted in any of the New England States. The statute of Massachusetts provides for the summoning of witnesses wanted in adjoining states and in Maine.

The statutes provide that the summons or subpoena shall be issued in New York

and Wisconsin by a judge of a court of record, in Iowa by the district court, in South Dakota by the circuit court, in Connecticut by a justice of the peace or a judge having authority to commit persons to prison, in Vermont by a justice or municipal or city judge, in Maine and Massachusetts by a justice of the peace and in New Hampshire by any justice.

The [1931] uniform act designates the case to which the act is applicable as a "criminal prosecution." It allows the summoning of a witness who will not be compelled to travel more than one thousand miles to reach the place of trial. It provides that the summons or subpoena shall be issued by a judge of a court of record, and that the pending prosecution shall be in a court of record. It exempts the witness from prosecution for crime or from a civil suit in connection with any matter which arose before the entrance of the witness into the state in response to the summons.

UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

(§ 16-46-101)

Prefatory Note

No. 1. Need

The need for a Uniform Photographic Copies of Business and Public Records as Evidence Act is apparent from the fact that in a dozen or more states some form of such an act was presented to the legislatures of different states last year. These varied in form from those relating to some specific type of records to act as similar to the one which has been drafted by the Commissioners. Several states withheld legislative action because they knew a uniform act was in the process of preparation and would probably be available at the next session of their legislature. Five states had previously adopted acts similar to the one under consideration, each with varying details. Thus it is recognized that legislative sanction for the use of photographic records as evidence is needed.

It is equally apparent that uniform state laws upon this subject would be of a great value to those engaged in business, industry or other activities as so many of them deal in interstate transactions. While their records are held usually at the home office, they may become involved in evidence in many states. If there were a uniform law in the different states, they would be able to comply with some method or system of preserving records through microfilming which would be sure to meet the test of the states adopting such statute.

The microfilm has become the common medium of clearing checks by practically all banks. Insurance companies regularly use the microfilm as a method of preserv-

ing their voluminous records. Department stores, wholesale distributors, and certain industries employ the microfilm process as a regular part of their business records. Hospitals frequently use microfilm to permanently preserve case histories and hospital records generally. Educational and other institutions use microfilm as a modern method of compressing voluminous records into a small space with an assured accuracy in the reports. One large manufacturer microfilmed 2,000,000 documents which had required an immense warehouse for storage. In microfilm form these same documents were stored in a vault 10 feet square. The filming process as a method of preserving records not only saves a tremendous amount of storage space but permits the installation of a more efficient index and record system. It also creates safety as a means of preservation of records because the microfilm may be placed in fireproof vaults for safe-keeping.

Because of the common practice of microfilming and its growth in modern business practice, an act dealing with this subject is a companion act to the Uniform Business Records as Evidence Act. Both stand upon the same theoretical background. As stated by Dean Wigmore, when such records are made in the regular course of business, a circumstantial guarantee or probability of their reliability arises out of the business practice justifying their use in evidence.

No. 2. The State of the Law in Absence of Statute

The use of microfilm reproductions and enlargements without statute immediately faces the best evidence rule. This requires the production of the original unless there is a satisfactory explanation for its absence. Courts have varied on the

character of the explanation required. Intentional destruction of the original has usually precluded the use of secondary evidence. To use a microfilm reproduction without statute requires in each instance that the attorney make a complete record

in the introduction of evidence to meet the demands of the best evidence rule. The microfilm statute would simply make such enlargements of reproductions admissible in evidence as a matter of law if they were made in the regular course of business. There are two leading cases on the microfilm subject.

The federal case of *United States v. Manton*, 1938, 107 F.2d 834, certiorari denied, 60 S.Ct. 590, 309 U.S. 664, 84 L.Ed. 1012, involves the use of photographic reproductions of checks on microfilm. The court authorizes this use, in saying:

"It was argued that the original checks themselves were the best evidence and their absence should have been accounted for as a prerequisite to the admission of the recordaks. With this contention we cannot agree. These recordaks are made and kept among the records of many banks in the due course of business and are within the words of 28 U.S.C., Sec. 695 [1732], 28 U.S.C.A. Sec. 695 [1732]. Their accuracy is not questioned. They represent in the course of a year, perhaps a million transactions. No one at all familiar with bank routine would hesitate to accept them as practically conclusive evidence. As proof of payment they constitute not secondary but primary evidence."

Under similar facts in *People v. Wells*, 1942, 44 N.E.2d 32, 380 Ill. 347, the Illi-

nois court reversed the admission of microfilm, declaring that:

"A careful reading of *United States v. Manton*, supra, reveals that the recordaks were admitted under act of Congress where special authority was given pertaining to writings and records made in regular course of business. We have no such legislative authority in this state which would support holding facsimiles of checks as being the best evidence or primary proof.

"The question then presents itself as to the rules of evidence in this state as to the admissibility of photographic representation of writings of the same size as the original writing and we find such photographic representation should be excluded if the original document is produced, or is obtainable, on the ground that it is secondary evidence."

The *Manton* case and the *Wells* case are the only cases precisely upon the microfilm copy. The *Wells* case felt the need of a statute to accomplish the result of the *Manton* case. It is this kind of a situation which shows the need of uniform legislation in spite of the fact that a legitimate disagreement might be urged to the *Wells* case. In advising business in respect to the preservation of records and the methods of keeping them, attorneys ought to be able to predict with clear-cut certainty the admissibility of records preserved through the microfilm process.

No. 3. The Actions of the Commissioners

A Uniform Photographic Copies of Business and Public Records as Evidence Act has been under consideration by the Conference on Uniform State Laws for the past five or six years. The task of drafting was commenced a little over two years ago. A preliminary draft of the proposed act was submitted at the Seattle meeting where the problem was extensively discussed followed by instructions of the Con-

ference as to the type of statute desired. At the St. Louis meeting in 1949 the drafting of the foregoing Act was made a principal problem of the Conference, and the Act as drafted and submitted was officially approved by the Conference. It is felt that its final approval and adoption as a uniform act is urgent in view of the substantial demand for such an act for early action by state legislators.

Commissioners' Comment to Section 1 (A.C.A. § 16-46-101(b))

It is contemplated that when in the regular course of business a microfilm reproduction is made and the original writing is destroyed that the microfilm be preserved and retained with the same care which would have been required of

the original. Thus, the fact of existence of the microfilm is a preliminary requirement to the admission of the enlargement. Normally the enlargement would not be made until needed and the microfilm would be held for such a purpose. In rare,

or at most occasional, cases the court may direct that the microfilm itself be made available for examination. If a false enlargement or false recording was charged, the film should be subject to inspection. In the usual case, however, testimony in court or by deposition as to the existence of the microfilm and identification of the enlargement is sufficient for admissibility.

It is possible that the original microfilm may become lost or destroyed without fault of the party responsible for its retention and that the original writing may have been destroyed after microfilming as

authorized by the Act. In that event it is the view of the Commissioners that the principles of the best evidence rule should apply and if a justifiable excuse for the absence of the microfilm is established that any secondary evidence including the microfilm enlargement is admissible.

Illustration, X and Y are in litigation. X sends to its attorney a microfilm enlargement for use in a trial. Before trial, a fire occurs and destroys the original microfilm reproduction. Under the best evidence rule apart from the Act the enlargement is admissible.

UNIFORM ACKNOWLEDGMENT ACT

(§ 16-47-201 ET SEQ.)

Commissioners' Prefatory Note (1960 Amendment)

In 1892 the Conference of Commissioners on Uniform State Laws adopted an Act for the acknowledgment and execution of written instruments. In 1914 the Conference adopted an Act for the acknowledgment of written instruments taken outside the United States.

These two Acts differed in many essential respects and at later sessions of the Conference it was concluded to rewrite the Acts so as to eliminate the confusion of inharmonious and contradictory provisions. The matter was accordingly referred to the appropriate section of the Conference, which made an exhaustive study of the subject, as a result of which a Uniform Act was adopted at the 1939 Conference of the Commissioners on Uniform State Laws held at San Francisco, California.

In the Act adopted there is no attempt to say what instruments shall be acknowledged — the Act merely provides that where by the laws of the State the acknowledgment of an instrument is required to be made, it may be made in the manner and form now provided by the law of the State or in the manner and form as prescribed by the Act. It should be explained to the Legislatures that there is no attempt to repeal the existing laws on the subject but the Act proposed is merely permissive in that an acknowledgment may be made either in the manner and form now provided by the law of the state or in the manner and form fixed by this Act. Thus a modern, uniform Act is being proposed for adoption in those states which desire it, without any attempt to alter or change the existing form and method in the event that form or method should be preferred over that proposed.

The Act likewise provides for the recognition within the State of acknowledgments made in other states, provided they be authenticated in the manner prescribed by Section 9, Sub-section 2 (A.C.A. § 16-47-209) of the Act.*

In addition to the adoption of the Act by

the Conference of Commissioners on Uniform State Laws, this Act likewise has approval of the American Bar Association, and it is accordingly recommended to the States for adoption in the strong belief that it represents a decided improvement in legislation on the subject.

There is not only a demand for a more modern enactment on acknowledgments in many of the States, but more uniformity on the subject in all the states. This act will provide both without disturbing the existing law for those who want to use it.

At the annual meeting of the Conference in Detroit, Michigan, in 1942, the Uniform Acknowledgment Act was amended by adding Section 11 (A.C.A. § 16-47-213) which provides for acknowledgments by persons serving in or with the Armed Forces of the United States within or without the United States.

At the annual meeting of the Conference in St. Louis, Missouri, in 1949, the Uniform Acknowledgment Act was further amended to permit acknowledgments to be made before attorneys at law in those jurisdictions where attorneys are so authorized, and to provide for facsimile signatures on certificates authenticating the official character of the officer taking the acknowledgment.

The 1949 amendment prescribed no form of certificate to be executed by the authenticating official, although Section 7 (A.C.A. § 16-47-207) contains forms of certificate for the officer taking the acknowledgment. In consequence, court clerks executing certificates of authentication under the Act had to word these to meet the varying requirements of other states. Therefore, the act was amended in 1955 to prescribe a uniform form of certificate for authenticating officials.

In 1960, upon the recommendation of the Department of Defense, through the office of its General Counsel, Section 11 (A.C.A. § 16-47-213) of the Uniform Acknowledgment Act was amended to in-

clude the dependents of service members. It is the considered opinion that such an extension to include service dependents will prove of considerable benefit particularly in the case of dependents who are overseas. The amendment also includes the Air Force which is recognized as a separate entity.

The 1960 amendment to Section 11 (A.C.A. § 16-47-213) clarifies and makes more specific the identification of the person who is serving in the Armed Forces or his dependents by citing the individual serial number of the serviceman. In this way the serviceman and his dependents are advantaged to the extent that acknowledgments in many instances are taken under transitory conditions and there is a frequent similarity and confu-

sion of names. Likewise, the serial number of the officer is noted along with his signature, rank and command which is of assistance in readily locating the officer in the event of change of duty.

The Act as applied to servicemen has been widely and successfully utilized during the period of World War II and thereafter. The benefits of extending the Act to dependents of those in the Armed Services have been accentuated with the number of families resident with servicemen in the overseas areas.

*This section has been changed substantially by the Arkansas General Assembly in its enactment.

Commissioners' Prefatory Note (1939 Act)

In 1892 the Conference of Commissioners on Uniform State Laws adopted an Act for the acknowledgment and execution of written instruments. In 1914 the Conference adopted an Act for the acknowledgment of written instruments taken outside the United States. See Uniform Acknowledgments Act, Foreign [withdrawn in 1943 as obsolete].

These two Acts differed in many essential respects and at later sessions of the Conference it was concluded to rewrite the Acts so as to eliminate the confusion of inharmonious and contradictory provisions. The matter was accordingly referred to the appropriate section of the conference, which made an exhaustive study of the subject, as a result of which a Uniform Act was adopted at the 1939 Conference of the Commissioners on Uniform State Laws held at San Francisco, California, and which is now being presented to the Legislatures of the various states for adoption.

In the Act adopted there is no attempt to say what instruments shall be acknowledged — the Act merely provides that where by the laws of the State the acknowledgment of an instrument is required to be made, it may be in the manner and form as prescribed by the Act. It should be explained to the Legislatures that there is no attempt to repeal the existing laws on the subject but the Act proposed is merely permissive in that an

acknowledgment may be made either in the manner and form now provided by the law of the state or in the manner and form fixed by this Act. Thus a modern, uniform Act is being proposed for adoption in those states which desire it, without any attempt to alter or change the existing form and method should be preferred over that proposed.

The Act likewise provides for the recognition within the State of acknowledgments made in other states, provided they be authenticated in the manner prescribed by Section 9, Subsection 2 (A.C.A. § 16-47-209) of the Act.*

In addition to the adoption of the Act by the Conference of Commissioners on Uniform State Laws, this Act has likewise had approval of the American Bar Association and it is accordingly recommended to the States for adoption in the strong belief that it represents a decided improvement in legislation on the subject.

There is not only a demand for a more modern enactment on acknowledgments in many of the States, but more uniformity on the subject in all the states. This Act will provide both without disturbing the existing law for those who want to see it.

*This section was changed substantially by the Arkansas General Assembly in its enactment.

Commissioners' Comment to Section 9 (A.C.A. § 16-47-209)*

The Uniform Acknowledgment Act, as amended in 1949, provided in Section 9 (A.C.A. § 16-47-209) for a certificate authenticating of the official character of an officer taking an acknowledgment. It prescribed no form of certificate to be executed by the authenticating official, although Section 7 (A.C.A. § 16-47-207) contains forms of certificate for the officer taking the acknowledgment. In consequence, court clerks executing certificates

of authentication under the Act had to word these to meet the varying requirements of other States. This amendment [1955] prescribes a uniform form of certificate for authenticating officials.

*This section has been changed substantially by the Arkansas General Assembly in its enactment.

Commissioners' Comment to Section 11 (A.C.A. § 16-47-213)

This section was amended in 1960 to include the dependents of service members, to include the Air Force which is now recognized as a separate entity, and to

make more specific the identification of the service member and his dependents by citing the serviceman's serial number and the serial number of the officer.

UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT

(§ 16-56-201 ET SEQ.)

Prefatory Note

Traditionally, statutes of limitations have been characterized as “procedural” laws, for conflict of laws purposes, so that the limitation periods prescribed by the forum state’s laws were applied. This result was reached despite its substantive effect of determining which party won the lawsuit. Forum shopping by delay-prone plaintiffs, or by their attorneys, with suits filed in states with long limitation periods, inevitably occurred.

One consequence was that the courts developed some rather inexact “exceptions” to the “general rule.” These included one that treated as “substantive” any limitation period that was “built into” the very statute, such as a wrongful death act, that created the cause of action sued on; another called the “specificity test” that treated a limitations statute as “substantive” if it was directed specifically to the sort of claim sued on; and possibly others less commonly employed. See Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 *Ariz.St.L.J.*, 1.

Another consequence was that about three-fourths of the states enacted so-called “borrowing statutes” which followed

no regular pattern but required application of a limitation period other than the forum state’s if some stated aspect of the cause of action occurred in or was connected with another state. These borrowing statutes are often difficult to interpret and apply. They have been the source of considerable judicial confusion.

In 1957 the Conference promulgated a Uniform Statute of Limitations on Foreign Claims Act which was designed to replace these variant borrowing acts. It achieved no general adoption, and was officially withdrawn in 1978. The major difficulty with it was its abrupt harshness. It cut all sorts of Gordian knots by providing simply that the governing law, as between that of the forum and of the state “where the claim accrued,” should be the one that prescribed the shorter period — “whichever bars the claim.” That turned out to be not acceptable. The present committee was set up to draft a different “limitations borrowing statute.” The consensus was that limitations laws should be deemed substantive in character, like other laws that affect the existence of the cause of action asserted.

Commissioners’ Comment to Section 1 (A.C.A. § 16-56-201)

Under the definition of “state,” the United States, though included in similar definitions in other uniform acts, is not included here because federal law will control federal limitations problems. Un-

der the definition of “State,” claims based upon the law of governmental units within a State are included within the coverage of the Act.

Commissioners’ Comment to Section 2 (A.C.A. § 16-56-202)

This section, treats limitation periods as substantive, to be governed by the limitations law of a state whose law governs other substantive issues inherent in the claim. This is true whether the limitation period of the substantively governing law is longer or shorter than that of the forum’s law.

The current judicial trend is in this

direction. Cases illustrating this approach include *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973); *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis.2d 193, 206 N.W.2d 414 (1973); and *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28 (3d Cir. 1975). In none of these cases did the forum court seem to be averse to applying the other-state sub-

stantive law merely because the consequence would be to apply the other-state limitation period also.

This act does not lay down general conflict of laws rules to govern an adopting state's choice of law. Each enacting state will have its own choice-of-law law, its own conflict of laws law, as each state does now. The current conflict of laws trend is away from older mechanical choice-of-law rules and toward more modern approaches combining most significant relationships, governmental interest analysis, and choice-influencing considerations. It is possible that this combination of modern approaches will gain general acceptance. This act, however, does not rely upon that development. It provides that the enacting state, as forum, will apply its

own conflicts law, whatever it may be, to select the substantive law that governs the litigated claim. If different issues involved in a single claim are found to be governed by the substantive laws of different states, the governing limitations law will be that of the one of those two or more states chosen by the conflicts law of the forum, or enacting, state. Thus the forum state's own conflicts law will always choose the limitations law that is substantively governing.

The term "limitation period" refers only to the commencement of an action and does not refer to requirements for giving of notice of claims (e.g., to a unit of government or the executor of an estate) as a condition to bringing an action.

Commissioners' Comment to Section 3 (A.C.A. § 16-56-203)

The phrase "governing conflict of laws" applies to both "statutes" and "rules of law."

This section treats all tolling and accrual provisions as substantive parts of the limitations law of any state whose law may be held applicable. They are part of that state's law as that state would apply it. The limitation period of another state, however, does not include its rules as to when an action is commenced. These rules are part of the procedural law of each forum state.

The final clause in Section 3 (A.C.A. § 16-56-203) constitutes the standard means of avoiding renvoi problems.

It should be noted that Section 3 (A.C.A.

§ 16-56-203) could conceivably give rise to application of the "unfairness" exception in Section 4 (A.C.A. § 16-56-204), for example, if a state tolls the running of its limitation period because of a defendant's physical absence from the state even though he is at all times subject to service under a long-arm statute. Tolling under such circumstances is unfair, and should be eliminated. Reliance upon the Section 4 (A.C.A. § 16-56-204) exception seems preferable, however, to complete disregard of tolling provisions. Most of them, like accrual provisions which determine when a cause of action comes into existence, are reasonable and not outmoded.

Commissioners' Comment to Section 4 (A.C.A. § 16-56-204)

This section provides an "escape clause" that will enable a court, in extreme cases, to do openly what has sometimes been done by indirection, to avoid injustice in particular cases. The "strong public policy" of a forum state can be effectuated. The section should rarely be employed, but will be useful if harsh results should in any case ensue from rigid application of the preceding sections. One illustrative possibility is noted in the Comment following Section 3 (A.C.A. § 16-56-203), above.

Litigants will not often be able to take advantage of the "escape clause." It is not enough that the forum state's limitation period is different from that of the state whose substantive law is governing; the difference must be "substantial," and the "fair opportunity" provision constitutes a separate and additional requirement. An "escape clause" is needed, but it is not designed to afford an "easy escape."

Commissioners' Comment to Section 5 (A.C.A. § 16-56-205)

This section is designed to avoid any unfairness that might occur because of reliance on prior conflicts law.

Commissioners' Comment to Section 9 (A.C.A. § 16-56-209)

If the State has adopted the Uniform Statute of Limitations on Foreign Claims Act, promulgated in 1957, it should be repealed.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

(§ 16-61-201 ET SEQ.)

Commissioners' Prefatory Note (1939 Act)

The desire for equal or proportionate distribution of a common burden among those upon whom it rests is everywhere fundamental. And if one of those subject to the burden discharges the obligation resting on all, it is natural that his claim for contribution to the discharge of this common liability be recognized. His payment, made pursuant to his own obligation, has accrued to the benefit of his co-obligors. Consequently, it is not surprising to find that all civilized systems of law provide for recovery of contribution in a variety of situations. Most conspicuous of these, in our own law, is contribution among co-sureties.

It is apparent that an injury resulting from the joint tort of two or more persons involves each of them, jointly and severally, in liability for the entire damage. It is equally apparent that this is an instance of a common obligation resting on two or more, the discharge of which by one of them accrues to the advantage of the others. At first blush, this appears to be a typical instance of the discharge of a common liability to be governed by the principle of contribution. But the policy of Anglo-American common law has been to deny assistance to tortfeasors on the understanding that they are wrongdoers and hence not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden.

As an original proposition, all might agree that courts should not lend their aid to rascals in adjusting differences among them. But all tortfeasors are not rascals, in spite of the literal translation of the term as wrongdoers. Most joint and several tort liability results from inadvertently caused damage, although it is almost impossible to draw a practical line between torts of inadvertence and others. It is, then, somewhat ironic to note that at common law contribution is denied among all tortfeasors and is allowed as a matter of course to one who has deliberately cho-

sen to violate a contractual obligation undertaken with others. And this situation is aggravated by the common-law view that the injured person is "lord of his action" and, when injured by the joint and several tort of two or more, may place the loss where and how he sees fit.

This item of private, rather than judicial, control of the distribution of loss arising from a common burden of liability has no doubt been largely responsible for the recent trend toward legislative and judicial repeal or modification of the common-law rule. Unfortunately, however, the legislatures in six states have confined contribution among tortfeasors to those subjected to joint and several judgment liability, thus virtually leaving to the injured person control of the distribution of loss through contribution. He cannot be compelled to take judgment against tortfeasors whom he does not wish to sue. By refusing to sue or take judgment against one or more of several tortfeasors commonly liable to suffer judgment, even though trial would have proven them equally responsible with him against whom judgment was taken, the injured person may confer immunity from contribution and at the same time secure complete compensation from the luckless tortfeasor whom he wishes to hold liable.

Of the scattered legislation and decisions establishing contribution among tortfeasors, no two are the same. Yet the recent tendency toward loss distribution among joint tortfeasors indicates the probable increase of such measures. Hence it is apparent that some common policy should be adopted and embodied in a model uniform statute to be submitted to all legislatures. With this in mind, the American Law Institute and the Conference of Commissioners on Uniform State Laws undertook in the Spring of 1936 jointly to sponsor such a statute. The two organizations united in the selection of Charles O. Gregory of the faculty of the

Law School of the University of Chicago as Reporter. The Institute appointed as its advisors, Warren A. Seavey, Young B. Smith and Edward S. Thurston. Later the Institute added to its list of advisers Robert G. Dodge and James W. Moore. The Conference assigned its share in the undertaking to its Section on Uniform Torts and Criminal Law Acts.

Preliminary drafts were prepared by the Reporter and discussed in conferences attended by the advisers of the Institute, its Director, and the Chairman of the Section on Torts and Criminal Law Acts of the Conference. A Proposed Tentative Draft of the Act was submitted to and considered by the Council of the Institute at its meeting on February 22-26, 1938. A tentative draft of the Act, as amended by the Council of the Institute, was submitted to and discussed on May 14, 1938, by the Institute at its meeting in Washington. Later the Act was submitted to the Conference and was considered by it at its annual meeting in Cleveland in 1938. As a result of these discussions the materials were reorganized and the Act was again brought before the Council of the Institute in February, 1939, and was approved by it at that meeting. Subsequently, the draft approved by the Council was submitted to the Institute at its annual meeting in May, 1939, and was there given the Insti-

tute's final approval. After its approval by the Institute, the draft was again brought before the Conference of Commissioners on Uniform State Laws at its annual meeting in San Francisco in July, 1939. The Conference voted its final approval of the Act at that meeting.¹

¹The following studies on a modern law effecting contribution among tortfeasors are helpful: Note, (1931) 45 Harv. L. Rev. 349; Legislation, (1931) 45 Harv. L. Rev. 369; Leflar, Contribution and Indemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130; Contribution Among Tortfeasors, New York Law Revision Commission, Reports, Recommendations and Studies (1936) 713-747; Bohlen, Contribution and Indemnity Between Tortfeasors (1936) 21 Corn. L. Q. 552; Tuft, Contribution Between Tortfeasors: A Legislative Proposal (1936) 24 Calif. L. Rev. 546; Gregory, Legislative Loss Distribution in Negligence Actions (1936); Gregory, Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action (1933) 47 Harv. L. Rev. 209; Gregory, Tort Contribution Practice in New York (1935) 20 Corn. L. Q. 269; Gregory, Contribution Among Tortfeasors: A Uniform Practice (1938) Wis. L. Rev. 365.

Comment to Section 1 (A.C.A. § 16-61-201)

The phrase "whether or not judgment has been recovered," etc., is included to indicate that joint and several judgment liability is not a necessary prerequisite to the recovery of contribution among tortfeasors. Thus if the injured person, P, is hurt by the concurrent negligence of A and B and recovers judgment in a suit only against A, contribution may be recovered by A against B in a separate action. This is in accordance with the practice in Wisconsin. The common obligation contemplated by this Act is the common liability of the tortfeasors to suffer adverse

judgment at the instance of the injured person, whether or not the injured person elects to impose it.

This Section does not include a definition of "pro rata share," although that phrase appears several times in the Act. Although it might be helpful to define this phrase, the draftsmen of the Act feel that in view of the difficulty in stating a concise definition and because of its well-established meaning in various contexts, the attempt of statutory definition would prove to be more harmful than otherwise.

Comment to Section 2 (A.C.A. § 16-61-202)

Comment on Subsection (1) (A.C.A. § 16-61-202(1)): This Subsection creates the right of contribution among joint tortfeasors. It does not, in any way, qualify the creation of this right by confining it to joint tortfeasors in any narrower sense than that indicated in Section 1 (A.C.A. § 16-61-201). Nor does it confine contribution to merely negligent tortfeasors or to those in any other way inadvertently harming others. It permits contribution among all tortfeasors whom the injured person could hold liable jointly and severally for the same damage or injury to his person or property.

Although the draftsmen of the Act feel confident that the so-called "equity rule" should prevail in determining the pro rata share amongst the tortfeasors in contribution proceedings, they have not stated this in the Act nor have they attempted to define "pro rata shares" in light of this conviction or in terms of the "equity rule." This rule is to the effect that the pro rata shares are determined on the basis of the number of tortfeasors commonly liable who are available (present in the jurisdiction) and solvent (financially responsible). This is in contrast to the old common-law rule that the number of persons commonly liable automatically determined the pro rata share of each in the contribution proceedings. These two rules grew up in connection with contract contribution. The so-called "equity rule" now prevails in most jurisdictions, whether or not the issue arises in law or equity actions.

To illustrate the equity rule, suppose A, B, and C by their concurrent negligence injure P and suppose P recovers in discharge of his claim \$6000 from A. Normally, A may have recourse against B and C for \$2000 each as contribution. But if C is out of the jurisdiction or is financially irresponsible, A may secure \$3000 from B and then A and B each may secure \$1000 from C, when, as and if they can get it.

Comment on Subsection (2) (A.C.A. § 16-61-202(2)): This Subsection merely states the universally recognized condition required for obtaining a money judgment for contribution. The Act in no way changes this requirement for stating a "cause of action" for contribution; and the subsequent Sections permitting cross-liti-

gation in the injured person's action, before these conditions exist, of some of the issues involved in securing contribution are in no way in conflict with the provisions of this Subsection.

Comment on Subsection (3) (A.C.A. § 16-61-202(3)): This Subsection is included to avoid what might easily prove to be an embarrassment if it were not covered. Nobody would deny that payment of an injured person's claim by one of the tortfeasors, pursuant to a settlement instead of after a judgment in a lawsuit, should entitle the paying tortfeasor to recover contribution to his payment from the other joint tortfeasors. The courts are generally agreed upon this in those states permitting recovery of contribution among tortfeasors without the requirement of joint and several judgment liability. But suppose the settling tortfeasor has purchased only his own immunity from suit, taking a covenant not to sue from the injured person, so that the other tortfeasors are still liable to the injured person. In such a case there is no reason to permit contribution since the settling tortfeasor has removed no burden common to all or more than one of the tortfeasors. Presumably, under this Section, if a tortfeasor, by a settlement, secures the release of one of the several tortfeasors other than himself, he may at least request contribution from that tortfeasor.

Comment on Subsection (4) (A.C.A. § 16-61-202(4)): This Subsection, it will be observed, is bracketed to indicate that its adoption is optional.* If adopted, it would permit apportionment of pro rata shares of liability of the joint tortfeasors as among themselves. It would not affect their joint and several liability toward the injured person. Without this Subsection, the ordinary rule of apportionment of the common liability among the tortfeasors in accordance with the number of them commonly liable obtains. Thus, if P is hurt by A, B, and C, who were concurrently negligent, and he recovers his damages from A alone, A may shift one-third of the burden to B and one-third of the burden to C. Ordinarily no inquiry is made into the respective degrees of fault of the tortfeasors as amongst themselves.

The draftsmen of the Act feel that there is a very strong case to be made for apportioning the common liability as among the tortfeasors when the evidence clearly indicates that one or more of the tortfeasors was much more at fault than one or more of the others. At the same time they wish to point out that each tortfeasor is still completely and fully liable toward the injured person. Granted, however, that a contribution statute does effect some measure of justice in distributing the common burden of liability equally among the tortfeasors, it is apparent that some measure of injustice is done when a tortfeasor whose fault was patently greater than another's can nevertheless shift to such other half of the burden imposed on him by the injured person.

The apportionment device is intended to work as follows: If the evidence indicates that there is a disproportion of fault

as among the tortfeasors, the court shall instruct the jury that if it finds the tortfeasors to have been negligent, they shall also fix their relative degrees of fault. Thus, if the court believes that an apportionment of fault is inappropriate in a particular case, none will be made. Naturally, a court trying a case without a jury will itself make the apportionment of fault when appropriate. Under the English tort contribution act the court always makes the apportionment; but the draftsmen feel that in the United States this had best be left to a jury within the ordinary power of a court to keep the issue of negligence from a jury when the evidence indicates that submission thereto would not be warranted.

*The brackets are deleted from the Arkansas version.

Comment to Section 3 (A.C.A. § 16-61-203)*

This Section was included to make universal the common-law view prevailing in some jurisdictions to the effect that recovery by the injured person of a judgment against one of two or more joint tortfeasors does not automatically discharge the others. Although an automatic discharge would not necessarily affect the sued tortfeasor's claim for contribution

against the discharged tortfeasors, this Section was thought to be necessary out of considerations of consistency, in view of the changes made in connection with releases in the following Section.

*The Arkansas version is different from the uniform act.

Comment to Section 4 (A.C.A. § 16-61-204)

This Section is intended to change the common-law view under which a release given by an injured person to one of two or more tortfeasors automatically releases the others. Since this result may be avoided any how by giving a covenant not to sue instead of a release, it was thought wise to obviate what must frequently be considered a technical pitfall by an injured person who releases one of two or more joint tortfeasors for a certain sum, presumably approximately the released person's share of the damage, intending to pursue his claim against the others. The direct bearing which this change has on contribution among tortfeasors, in view of such releases and partial settlements, is apparent.

The second clause of this Section is included simply to emphasize the fact that

a release of one tortfeasor will benefit the others by reducing the claim against them in the amount of the consideration paid therefor, or in the amount or proportion by which the release provides that the total claim shall be reduced, whichever is larger.

Suppose P is hurt, apparently by the concurrent negligence of A and B. He wishes to pursue his remedy against B but wants to let A off lightly. For \$100 paid he releases A and then sues B. The jury might fix P's damages and the court might then deduct \$100 from the amount of the verdict before entering the judgment. Thus, on a verdict for P against B of \$2000, the court would enter judgment for \$1900. Although this could be handled by introducing evidence before the jury of a payment of \$100 and by letting the jury

take that into account in fixing P's damages, this method would be less satisfactory than the solution suggested in the previous sentence.

Under each alternative of the second clause of this Section, A, the tortfeasor to whom a release is given, should be credited in any contribution proceedings against him, with the amount by which the injured person's, P's, claim is reduced in accordance with the Section. Thus, if the release mentions no amount or proportion by which P's claim against B is reduced, but A paid P \$100 for his release, then if the jury awards P \$2000 damages against B, P should get judgment for only \$1900. Then in B's action against A for contribution, if A does not dispute the amount of P's recovery against B, or, if he

disputes it, is unsuccessful in getting that amount lowered as the basis of the claim for contribution, B should be allowed to recover \$900 from A as contribution. The explanation is that the "common liability" is for \$2000, of which A has already paid \$100. In contribution proceedings between two tortfeasors where no apportionment of fault takes place and where the damages of the injured person are \$2000, the paying tortfeasor should be able to shift one-half of the burden, or \$1000, to the non-paying tortfeasor. But if the non-paying tortfeasor had already paid \$100 to the injured person, thereby lowering the other tortfeasor's liability by that amount, he should have credit for the payment in contribution proceedings.

Comment to Section 5 (A.C.A. § 16-61-205)

Although the substance of this Section would probably be recognized anyway by courts allowing contribution among tortfeasors under the previous sections of this Act, it seems advisable nevertheless to include it. Under it, an injured person, acting in collusion with or out of sympathy for one of the tortfeasors, cannot relieve

him from the obligation to contribute to the other tortfeasors by releasing him. The only way in which such a release can free the released tortfeasor from his duty to contribute is to include a provision to the effect that the other tortfeasors shall be released from the injured person's pro rata share of the common liability.

Comment to Section 6 (A.C.A. § 16-61-206)

This Section simply makes clear that the Act is not intended to affect any right of indemnity under existing law.

Note to Section 7 (A.C.A. § 16-61-207)

This Section is bracketed to denote that its adoption with the preceding Sections is optional. It was the consensus that the various states in which legislatures were considering the enactment of the substantive provisions of this Act, might already have available statutes or rules of procedure under which might be effected an adequate contribution practice within the injured person's action for damages. For instance, the procedural provisions in Wisconsin and Pennsylvania are fully adequate to effect such a practice. The pro-

cedural provisions are included for the benefit of such jurisdictions wanting procedural facilities. These provisions are modeled as closely as possible after rules 14 and 13(g) of the new Federal Rules of Civil Procedure, with adaptations to the substantive provisions of the Act, and are suitable for adoption as rules of court or enactment as legislation. This section contains some provisions completely absent from the federal rules; but such provisions were thought to be essential to a desirable contribution practice under this Act.

Comment to Section 7 (A.C.A. § 16-61-207)

Comment on Subsection (1) (A.C.A. § 16-61-207(1)): This Subsection enables one or more of several joint tortfeasors sued by the injured person to add as third-party defendants any fellow joint tortfeasors whom they believe to have been also responsible for the tort complained of and to litigate against them in the injured person's action any claims for contribution. In this way, the interests of justice may be promoted by obviating the necessity of a separate action for contribution. It should be noted that this Section does not affect in any way the substantive law of contribution concerning the accrual of a cause of action for contribution as set forth in Section 2, Subsection (2) (A.C.A. § 16-61-202(2)), above. It merely provides for a litigation, in advance, of those issues upon which the claim for a money judgment for contribution will ultimately depend. A cross-claimant (third-party plaintiff) who is successful on his cross-claim for contribution cannot procure a money judgment for contribution unless he has paid more than his pro rata share of any judgment liability he may have sustained to the injured person, in accordance with the provisions of Section 2, Subsection (2) (A.C.A. § 16-61-202(2)) of this Act.

Suppose P is hurt by the concurrent negligence of A and B, and sues A for damages. Without this Subsection, P's action against A would proceed to judgment which A would pay. Then A would bring a separate action against B for contribution, in which the issues litigated would be substantially identical with those raised in P's action against A as far as evidence is concerned. Under this Subsection, A could make B a third-party defendant and proceed to prove that if he, A, is liable to P, B is also. The upshot would be that if he were successful in his claim against B, which would be litigated at the same time as P's against A, then A, on payment of P's judgment, could move in the same action for contribution against B, all of the germane issues having been settled in P's action. This practice is already well-established in Wisconsin and in several British jurisdictions.

This Subsection also provides for P's amendment of his pleadings to include the third-party as a codefendant, as if the

latter had been originally sued with A. And the final sentence of the Subsection permits any person added as a third party, in turn to invoke the provisions of the Subsection in adding any other alleged joint tortfeasor not already present in the action.

Comment on Subsection (2) (A.C.A. § 16-61-207(2)): This Subsection merely makes the provisions of Subsection (1) (A.C.A. § 16-61-207(1)) available to a plaintiff in his capacity as "defendant" on a counterclaim.

Comment on Subsection (3) (A.C.A. § 16-61-207(3)): Part (a) (A.C.A. § 16-61-207(3)(a)) of this Subsection is an adaptation of Rule 13(g) of the federal rules, dealing with cross-complaints between co-parties. It is included to permit cross-litigation where the injured person has himself sued the joint tortfeasors as codefendants, so that the provisions of Subsection (1) (A.C.A. § 16-61-207(1)) are not appropriate. The same procedural convenience and interests of justice are served by this Subsection as are by Subsection (1) (A.C.A. § 16-61-207(1)), that is, the litigation in the injured person's action of those issues germane to the ultimate claim for contribution in order to obviate the necessity of a subsequent separate action for contribution.

Part (b) (A.C.A. § 16-61-207(3)(b)) of this Subsection is included to afford contribution on motion among parties subject to joint judgment liability to the injured person, where they had neglected to file cross-claims against each other for contribution pursuant to the provisions of part (a) (A.C.A. § 16-61-207(3)(a)) of this Subsection. This is in accordance with established practice in several jurisdictions.

The final sentence of this Subsection is included to compel recourse to the injured person's action as a means of securing contribution, in order to obviate as much subsequent separate litigation as possible. Application of this sanction is made contingent to allow for situations where relief pursuant to its terms is held to be impossible because, for instance, of the failure of a co-party to appear in the action although served by the injured person, or any other reason.

This whole Subsection is, of course, ap-

plicable to situations where a sued defendant (the cross-claimant) adds a third-party defendant under Subsection (1) (A.C.A. § 16-61-207(1)), against whom the plaintiff (the injured person) amends his complaint. Such added third party would under such circumstances become a codefendant and would be entitled to the benefits of this Subsection, and all of the defendants would become subject to the contingent sanctions of this Subsection.

Comment on Subsection (4) (A.C.A. § 16-61-207(4)): This Subsection is included to insure to courts the power to dispose of cross-litigation between defendants in which those factors are determined on which the subsequent final judgment for contribution will be entered. It also permits the court to enter a final judgment for contribution after a claimant, in whose favor the determinations of factors ultimately leading to contribution were made, has shown that he has paid to the plaintiff in discharge of the common liability more than his pro rata share.

Comment on Subsection (5) (A.C.A. § 16-61-207(5)): This Subsection should be adopted only if subsection (4) of Section 2 (A.C.A. § 16-61-202(4)) is adopted. The object of the provision is to compel litigation of the issue of apportionment during the trial of the other issues concerning contribution, if at all. Thus, if a joint judgment is finally entered in P's favor against A and B, which A pays, on his motion against B for contribution, under Subsection (3) (A.C.A. § 16-61-207(3)) of this Section, he cannot for the first time raise the issue of apportionment of fault as between himself and B, after the trial has been concluded, but must abide by the contributive ratio of equal pro rata shares.*

*Arkansas has included a Subsection 6 which was not in the uniform act.

UNIFORM ENFORCEMENTS OF FOREIGN JUDGMENTS ACT

(§ 16-66-601 ET SEQ.)

Prefatory Note

Court congestion is a problem common to all states. Overcrowded dockets, overworked judges and court officials, with attendant delays, inevitably tend to lower standards for the administration of justice. One of the things that contributes to calendar congestion is the Federal necessity of giving full faith and credit to the judgments of courts of other states. U.S. Const. art. IV, § 1. While there is no constitutional requirement that a debtor who has had a full due process trial in one state need be given a second full scale trial on the judgment in another state, this is the only course generally available to creditors. The usual practice requires that an action be commenced on the foreign judgment. The full procedural requirements apply to the second action.

In 1948 the National Conference of Commissioners on Uniform State Laws approved the original Uniform Enforcement of Foreign Judgments Act. This act was a distinct advance over the usual method. It provided a summary judgment procedure for actions on foreign judgments. Even this advance, however, fell far short of the method provided by Congress in 1948 for the inter-district enforcement of the judgments of the Federal District Courts. 28 U.S.C., § 1963. Fur-

ther, widespread adoption by the states of some form of the Federal Rules of Civil Procedure which include regular summary judgment practice made special summary judgment acts superfluous.

This 1964 revision of the Uniform Enforcement of Foreign Judgments Act (A.C.A. § 16-66-601 et seq.) adopts the practice which, in substance, is used in Federal Courts. It provides the enacting state with a speedy and economical method of doing that which it is required to do by the Constitution of the United States. It also relieves creditors and debtors of the additional cost and harassment of further litigation which would otherwise be incident to the enforcement of the foreign judgment. This act offers the states a chance to achieve uniformity in a field where uniformity is highly desirable. Its enactment by the states should forestall Federal legislation in this field.

*The 1964 revision of the Uniform Enforcement of Foreign Judgments Act was enacted by the Arkansas General Assembly by Acts 1989, No. 501, as § 16-66-601 et seq., and the former subchapter was repealed by the same act.

Notes to Section 1 (A.C.A. § 16-66-601)

Section 1 (A.C.A. § 16-66-601). Definitions. No distinction is made between judgments and decrees requiring the payment of money, ordering or restraining the doing of acts, or declaring rights or duties of any other character, whether entered in law or equity, in probate, guardianship,

receivership, or any other type of proceedings. The fact that there is a "judicial proceeding" entitled to full faith and credit within the meaning of Article IV, Section 1, of the United States Constitution is the only criterion employed.

Notes to Section 2 (A.C.A. § 16-66-602)

Section 2 (A.C.A. § 16-66-602). Registration of Judgment. Throughout the Act, as in this section of it, the law of the state in which the foreign judgment is to be registered is to furnish the substantive or

procedural guide for such matters as who may initiate the registration proceeding, the court in which registration may be had, and the statute of limitations.

Notes to Section 3 (A.C.A. § 16-66-603)

Section 3 (A.C.A. § 16-66-603). Application for Registration. The Act undertakes to lay down no new methods for authentication of the judicial proceedings of other states. The full faith and credit clause of the Constitution authorized the federal Congress "by general laws (to) prescribe the manner in which such *** proceedings shall be proved and the effect thereof," and by its act of May 26, 1790 (Rev. Stats., Sec. 905; Comp. Laws, sec. 1519; 28 U.S.C., sec. 687) the Congress prescribed a method for authentication. Since then the Congress has for all practical purposes been silent, though the constitutional clause undoubtedly empowers it to go much farther than it has gone. Most of the state enactments do little more than re-

peat, with small variances of language, the provisions of the federal Act of 1790. Others of them authorize different procedures. If the federal enactment is complied with the authentication is adequate in any event, but the procedure set out by it is not exclusive, and a foreign judgment may permissibly be proved in accordance with a state's statutory procedure or in accordance with common law methods, as well as in the federally prescribed manner. The final sentence in the section is designed to afford reasonable protection to any person who might for any reason rely on the record of the original judgment without having received other notice of the pendency of the registration proceeding.

Notes to Section 4 (A.C.A. § 16-66-604)

Section 4 (A.C.A. § 16-66-604). Personal Jurisdiction. This section is designed to lay a foundation upon which a new personal judgment may subsequently

be rendered, on the old judgment as a cause of action, against the judgment debtor.

Notes to Section 5 (A.C.A. § 16-66-605)

Section 5 (A.C.A. § 16-66-605). Notice in Absence of Personal Jurisdiction. The first sentence of this section is designed to achieve a double purpose. For one thing, it will assure fairness to the judgment debtor by making it reasonably certain that he will actually learn about what is being done with the judgment that has

been rendered against him; for another thing, it will lay a foundation upon which a new judgment quasi in rem can validly be entered against the property of the judgment debtor levied upon in the state where the judgment is being registered, under section 12, *infra*.

Notes to Section 6 (A.C.A. § 16-66-606)

Section 6 (A.C.A. § 16-66-606). Levy. The right to levy on property of the judgment debtor at once after registration of the judgment, without waiting until the registered judgment becomes a final judgment of the state of registration, can op-

erate to give to judgment creditors a type of relief almost as efficient as would be the case if execution could be directly on the foreign judgment. The procedure is substantially similar to what is variously known as attachment, trustee process,

garnishment, distress, factorizing, and the like. In addition, it includes the functions of the ordinary writs of execution.

Notes to Section 7 (A.C.A. § 16-66-607)

Section 7 (A.C.A. § 16-66-607). New Personal Judgment. The effect of the Act is to set up a summary judgment procedure specially suited to actions on foreign judgments. Recent discussions of summary judgment procedure include Clark and Samenow, the Summary Judgment (1929) 38 Yale L. Jour. 423; Shientag and Cohen, Summary Judgments in the Supreme Court of New York (1932) 32 Col. L. Rev. 825; Finch, Summary Judgment Procedure (1933) 19 Amer. Bar Assn. Jour. 504; Saxe, Summary Judgments in New York — a Statistical Study (1934) 19 Corn.

L. Q. 237; Rothschild, Summary Judicial Power (1934) 19 Corn. L. Q. 361; Shientag, Summary Judgment (1935) 4 Fordham L. Rev. 186; Chadbourn, A Summary Judgment Procedure for North Carolina (1936) 14 N. C. L. Rev. 211; McCabe, Summary Judgment (1938) 11 So. California L. Rev. 436; Suggs and Stumberg, Summary Judgment Procedure (1944) 22 Texas L. Rev. 433; Kennedy, the Federal Summary Judgment Procedure (1947) 8 Brooklyn L. Rev. 5.

Notes to Section 8 (A.C.A. § 16-66-608)

Section 8 (A.C.A. § 16-66-608). Defenses. Under the full faith and credit clause, there are certain defenses, particularly lack of jurisdiction in the court rendering judgment, payment of the judgment, and fraud or collusion in its procurement, which the judgment debtor

may properly raise in a later suit on the judgment. The uniform act is so drafted as to secure a judgment debtor the essentials of due process of law in minimum form, at the same time giving him reasonable opportunity to present every defense which under the law he is entitled to present.

Notes to Section 12 (A.C.A. § 16-66-612)

Section 12 (A.C.A. § 16-66-612). New Judgment Quasi In Rem. The final judgment quasi in rem provided for by this

section is to be contrasted with the final personal judgment provided for by section 7 (A.C.A. § 16-66-607).

INTRASTATE FRESH PURSUIT ACT

(§ 16-81-301 ET SEQ.)

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Prefatory Note

A great need was filled by the Interstate Fresh Pursuit Act, drafted by the Interstate Commission on Crime, to prevent criminals from utilizing state lines to handicap the police. This is proven by its almost instant enactment in some two thirds of the states. Furthermore, there have been repeated requests from the police to extend the principles of the interstate act to permit fresh pursuit of criminals across county and municipal lines.

The Act on Intrastate Fresh Pursuit is

the result. This act follows the sovereignty into another, it applies not only to felonies, but to any criminal offense committed in the presence of the officer, or to a person for whom an officer holds a criminal warrant. Simple provisions, as in the case of the interstate act, are made to safeguard the rights of the person arrested. The requests of law enforcement authorities themselves prove the need for this new, simple, and sensible law.

UNIFORM ACT ON INTERSTATE FRESH PURSUIT

(§ 16-81-401 ET SEQ.)

A.C.R.C. Notes. These commentaries are reprinted with permission of the Council of State Governments.

Prefatory Note

The act on the Fresh Pursuit of Criminals across State Lines was drafted by the Interstate Commission on Crime in the mid-1930s. Its purpose is to prevent criminals from utilizing state lines to handicap police in their apprehension. At the present time, most desperate criminals head straight across state lines after the commission of a crime, knowing that there is comparative safety beyond the border. In the foreign state the pursuing officer from the state wherein the crime was committed is, in general, no longer an officer. This abnormality, so contrary to all justice and reason, is remedied in a simple manner by this act. Thereunder, the moment an officer in fresh pursuit of a crim-

inal crosses a state line, the state he enters will authorize him to catch and arrest such criminal within its bounds. The statute grants this right only when the officer is in fresh pursuit of a criminal, that is, pursuit without unreasonable delay, by a member of a duly organized peace unit, and only in cases of felonies or supposed felonies occurring outside the boundaries of the state adopting the act. It is thus based upon the little-known common-law doctrine of fresh pursuit, from which the statute has derived its name.

Simple provisions are made to safeguard the rights of the arrested person and to provide for his return to the state where he committed the crime.

INTERSTATE COMPACT FOR THE SUPERVISION OF PAROLEES AND PROBATIONERS

(§ 16-93-901 ET SEQ.)

A.C.R.C. Notes. These commentaries are reprinted with permission of the Council of State Governments.

Prefatory Note

The oldest interstate correctional compact is the Interstate Compact for the Supervision of Parolees and Probationers, first released in 1934. This agreement addresses the problem of providing continuing supervision for parolees and probationers who, during their terms of supervision, had valid reasons to take up residence in another state. The Compact stipulates that the probationer or parolee — in order to enter a “receiving state” — must be a resident of such state or have family residing within such state and further requires that the parolee or probationer must be able to obtain employment in the receiving state. These requirements can be relaxed if the receiving state consents to the parolee’s or probationer’s entry.

In 1950, an amendment to the Compact was developed to permit parole or probation violators who had been under compact supervision in a receiving state to be confined in that state. Known as the Out-of-State Incarceration Amendment and requiring new legislative action by Compact states, the option was seen as particularly valuable for violators with only a short time left to serve on their sentences who were under Compact supervision in their home state. Use of the amendment, discretionary with officials of member states, could eliminate the financial burden and other problems involved in returning prisoners long distances to the state which sentenced them.

UNIFORM CRIMINAL EXTRADITION ACT

(§ 16-94-201 ET SEQ.)

An explanation of the act to make uniform the law in the several states with reference to the extradition of persons charged with crime.

The Federal Constitution, adopting substantially the language of the earlier Articles of Confederation between the thirteen colonies provides, in section 2 of Article VI, that "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

But notwithstanding the clarity of the above provision, the federal Congress, acting upon an opinion of Attorney-General Randolph, decided in 1793 that the section of the constitution was not self-executing, chiefly because it provided no machinery for its execution, and passed in 1793 an act which has been brought forward as sections 5278 and 5279 of the U.S. Revised Statutes of 1875, as follows:

5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the state or territory from whence the person so charged has fled; it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs and expenses incurred in the apprehending,

securing and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

5729. Any agent so appointed who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or imprisoned not more than one year.

The above section of the Constitution and the above federal law, form the basis of the interstate extradition of fugitive criminals in all the states. The Constitution creates the right to demand the fugitive, and the federal law creates the machinery, and they thus distinguish interstate extradition from international extradition which rests entirely upon treaties and is defined by treaty limitations.

But the Act of Congress did not create machinery to cover all the exigencies which arise; and as the federal law of 1793 has never been enlarged by Congress, except to a limited extent in the District of Columbia, to authorize the bringing back of fugitive offenders against the laws of the United States applicable there, it has come to be recognized that the several states may provide machinery for applying the law of extradition in respect to matters not covered by the Act of Congress. Thus the states can legislate upon the method of applying for the writ of habeas corpus, upon the method of arrest and detention of the fugitive before extradition is demanded, upon the mode of preliminary trial, upon the manner of applying for a requisition, upon the extent of asylum allowed a prisoner when brought back to the state from which he has fled, and upon his exemption from civil process; not to mention other points less important which have always been regulated by local law.

These and many other subjects collateral to the main right to extradition have been the subjects of quite diversified legislation and judicial decision in the various states, and the bodies of law thus built up are quite different throughout America. It therefore appeared wise to the Conference of Commissioners on Uniform State Laws to prepare an act embracing what appear to be the best features of all the various laws of the several states as well as the judicial law applicable, and to offer it as a practicable law for all the states to adopt, thus codifying the practice and promoting uniformity at the same time. Footnotes below the text of most of the sections give the origin of the language where statutory, and the judicial decisions upon which it is based when the sections involve restatement or codification of judicial law.

Section 6 (A.C.A. § 16-94-206) of the Act, however, is a new creation of the Conference of Commissioners, designed to cover cases not reached by existing extradition laws. Hitherto, it has been possible to extradite only those criminals who could be said to be "fugitives", that is, who had been physically present in the state in which the crime was committed and have fled therefrom. However, crimes are committed against the laws of a state by acts done outside of that state. Many states have enacted statutory provisions for the punishment of a crime any part of which is committed in that state.

To meet the practical need of authority for the extradition of criminals who cannot technically be called fugitives, the

National Conference provided in Section 6 (A.C.A. § 16-94-206), as approved in 1926, for extradition of a criminal from the state in which he acted to the state in which his acts had criminal effect. By an amendment approved by the Conference in 1932, this Section is now drafted to permit the extradition of that person not only from the state in which he acted, but from any state into which he thereafter moves.

It is true that the Constitution does not put upon the states the obligation to extradite criminals who are not fugitives. But while the Constitution requires that fugitives shall be extradited, it does not prohibit states from endeavoring to enforce the criminal law by the extradition of those other persons who have violated the law of the demanding state but who cannot be called fugitives from that state. The effectiveness of Section 6 (A.C.A. § 16-94-206), therefore, depends upon comity between the states, rather than upon the mandatory effect of the Constitution.

Unfortunately, the act cannot be adopted by Congress for the District of Columbia without making substantial changes. The District of Columbia is not a territory administered as such. Congress has authorized the Chief Justice, or in his absence or incapacity to act, an associate justice of the Supreme Court of the District of Columbia, to receive a demand for extradition made by the Governor of a state; but the method of requiring the remand of criminals to the District of Columbia is not governed by the extradition statutes.

Comment to Section 2 (A.C.A. § 16-94-202)

N.B. The Statutes on Interstate Extradition are practically identical in Alabama, Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota,

Oklahoma, South Dakota, and Utah, and also in the Territories of Alaska and Puerto Rico.

Comment to Section 3 (A.C.A. § 16-94-203)

Drafted from Act of Congress of 1793, and decisions in Davis case, 122 Mass. 324, and Pearce v. Texas, 155 U.S. 387; cf. Scott on Interstate Rendition, paragraph 91. The certification is provided by U.S.R. s.5278. The effect of the certification is

explained in Kentucky v. Dennison, 24 How. 66. The recognition of informations in states which allow them is probably supported by Hogan v. O'Neill, 255 U.S. 52; 65 L.Ed. 497.

Comment to Section 4 (A.C.A. § 16-94-204)

Taken from Connecticut Statutes, sec. 1566.

Comment to Section 5 (A.C.A. § 16-94-205)

Drafted in part from *Hyatt v. People*, ex rel Corkran, 188 U.S. 691, quoted in Scott on Interstate Rendition, Sec. 96, and *Innes v. Tobin*, 240 U.S. 127. On the violation of parole, see *Hughes v. Pflanz*, 138 Fed. 980.

Comment to Section 7 (A.C.A. § 16-94-207)

Hyatt v. People, 188 U.S. 691; *Jourdan v. Donahue*, 84 N.Y. 438; *Arnold v. Justice*, 84 Minn. 237.

Comment to Section 10 (A.C.A. § 16-94-210)

The present law of Massachusetts, Connecticut, Delaware and Minnesota allows merely an "opportunity" to the accused to demand an investigation. New York and some other states prescribe definite time.

For a uniform act, an indefinite time to be made certain by a judge before whom the accused shall be brought, would seem the plan most likely to satisfy all the states. This is the law in Oklahoma.

Comment to Section 11 (A.C.A. § 16-94-211)

Conn.Gen.Statutes, Sec. 1568 modified, and Oklahoma.

Comment to Section 13 (A.C.A. § 16-94-213)

Arkansas Statutes, Sec. 3674, is almost the same as the law of Colorado, Illinois and Kansas. This section is combined,

however, in part with the law of Indiana, Sec. 1900, modified.

Comment to Section 14 (A.C.A. § 16-94-214)

11 Ruling Case Law, p. 720: "The arrest may be made either by virtue of a warrant from a magistrate or by an officer or private person, who may justify the arrest by showing that prima facie a felony or other crime has been committed by the prisoner in another state, or that he stands charged therewith." To the same effect see Scott on Interstate Rendition, p. 161. An arrest without warrant was sustained in the following cases where the accused stood charged with a felony punishable by imprisonment for more than one year. *Simmons v. Van Dyke*, 138 Ind. 380 (forgery); *In re Henry*, 29 How. Pr. (N.Y.) 185 (robbery); *Dow's case*, 18 Pa. 37 (forgery); *State v. Taylor*, 70 Vt. 1 (burglary).

The preliminary draft of this Section provided for arrest without a warrant in all cases where the accused stood charged with a "felony" in the demanding state. Because of the belief that "felony" did not have a uniform meaning, the Conference substituted the expression "charged with a crime punishable by death or life imprisonment." The Conference has become convinced that the enactment of this substituted language would result in restricting too severely the machinery for the enforcement of the criminal law, and would in many instances change the present practice of arresting without a warrant persons who have committed felonies punishable by imprisonment for more than one year but less than for life. To avoid

this restrictive effect, the Conference in 1932 revised the Section to provide for arrest without a warrant where the accused stands charged "with a crime pun-

ishable by death or imprisonment for a term exceeding one year." This is an adoption of the usual definition of "felony."

Comment to Section 15 (A.C.A. § 16-94-215)

Alabama Code of 1923, Sec. 4168, restricted.

Comment to Section 16 (A.C.A. § 16-94-216)

Alabama Code of 1923, Section 4169, modified.

Comment to Section 19 (A.C.A. § 16-94-219)

Alabama Code of 1923, Sec. 4174, changed.

Comment to Section 20 (A.C.A. § 16-94-220)

Scott on Interstate Rendition, Chapter XVIII.

Comment to Section 22 (A.C.A. § 16-94-222)

Illinois Law, Sec. 8, modified.

Comment to Section 24 (A.C.A. § 16-94-224)

Illinois Law, Section 11. This section is placed in brackets to indicate that it may be omitted from the Act in states where it does not seem wise to include it.*

* Brackets are deleted from the Arkansas version.

Comment to Section 25 (A.C.A. § 16-94-225)

Scott on Interstate Rendition, 136.

Comment to Section 26 (A.C.A. § 16-94-226)

Lascelles v. Georgia, 148 U.S. 543.

UNIFORM ARBITRATION ACT

(§ 16-108-201 ET SEQ.)

Prefatory Note

This Act covers voluntary written agreements to arbitrate. Its purpose is to validate arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary.

The Conference of Commissioners on Uniform State Laws promulgated a uniform arbitration act in the early 20's. It was adopted in a few states. It proved unsatisfactory and was later withdrawn by the Conference. With the growing interest in a number of states in enacting a modern arbitration statute, the Conference renewed its interest in the subject and approximately five years ago, appointed a committee to prepare a draft act for consideration by the Conference. The committee so appointed presented its first draft at the Conference of Commissioners in 1954. After revision, it was again presented to and adopted by the Conference on August 20, 1955.

In general, this act follows the pattern of the arbitration statutes of New York and of some fifteen other states. It validates written agreements to arbitrate disputes whether arising subsequent to the agreement or existing at the time it was made. It covers labor-management agreements to arbitrate unless the agreement otherwise provides. In view of the fact that some states, such as New York, extend the coverage of their act without exception, the clause at the end of the last sentence of Section 1 was bracketed. However, Section 1 (A.C.A. § 16-108-201) as

enacted by the Arkansas General Assembly did not include the bracketed language.*

The act provides that the motion procedure of the state shall be used when orders are desired to enforce the agreement to arbitrate, or for confirming, vacating or modifying an award, or for other purposes designated in the act. An award, once confirmed, may be reduced to judgment which is enforceable as is any other judgment.

Many of the provisions are designed to meet problems not anticipated by the parties when the agreement was made and for which no provision exists in the agreement. Many of the sections are subject to the terms upon which the parties have agreed.

The grounds specified for confirming, vacating or modifying an award are for the most part the traditional ones recognized by statutes of many states. A provision not generally found, permits arbitrators to correct minor errors in their award or to clarify the award when needed.

The Section on Appeals, A.C.A. § 16-108-219, is intended to remove doubts as to what orders are appealable and to limit appeals prior to judgment to those instances where the element of finality is present.

*The last sentence of paragraph three of this prefatory note was added by the Arkansas Code Revision Commission.

UNIFORM DECLARATORY JUDGMENTS ACT

(§ 16-111-101 ET SEQ.)

Prefatory Note

The Declaratory Judgment is a big, forward step in administrative justice. Its benefits will not be confined to any class or portion of society. Every citizen of the State will enjoy and profit by its good offices. Accordingly, the effort to enact it as a part of the jurisprudence of a state can involve no conflict of political parties, no division of industrial interests, and no clash of social forces.

The present system of court procedure has in certain respects, become antiquated. It holds its place in the administration of justice largely on account of a tradition that those things which are ancient must be good. As a matter of fact, the practice of cases in court has stood still for many years while business and social affairs have been progressing. The result has been that a gulf exists between the judicial process and the community interest that it is supposed to serve; and into this gulf have been dropped a great many possibilities. For any one to think that the administration of the law prevailing centuries ago is adequate for the needs of the present, is quite as absurd as to indulge the idea that the clothes of the boy can be worn in comfort by the grown man.

Today our courts are operated largely on the fundamental idea of giving to an injured party reparation and redress. Certainly it is still a primary rule of jurisdiction that until a party has been hurt, and has suffered loss, he has no standing in court.

This ancient rule of jurisdiction has long been found too narrow to meet the requirements of modern social, industrial and economic conditions. Men ought not be forced to the necessity of encountering damage or assuming ruinous responsibilities before they are permitted to seek and secure a court decision as to their rights and duties. Such a scheme puts a premium upon delinquency and penalties altogether out of harmony with a proper conception of law, order and justice. It should be the primary purpose of the

State to save its citizens from injury, debt, damage and penalties; and to this end the highest function of the court ought to be to decide, when possible, the controversies of parties before any loss has been suffered or any offense committed.

The Declaratory Judgment aims at abolishing the rule which limits the work of courts to a decision which enforces a claim or assesses damage or determines punishment. The Declaratory Judgment allows parties who are uncertain as to their rights and duties, to ask a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured.

The Declaratory Judgment principle is of Roman origin. It spread over the principal part of continental Europe long before the American colonies became the United States. It has been in effect in Scotland for over three centuries. In England it has existed since 1858 with ever-broadening scope and increased influence. It is used in the greater part of the British colonies and dominions, including Canada. Experience has demonstrated in the countries where the Declaratory Judgment procedure has been adopted that its use has resulted in a great saving in actual litigation, thereby anticipating those long, bitter and expensive controversies that follow highly litigated cases for breach of contracts and denial of rights, which can be avoided by the adoption and use of the Declaratory Judgment procedure.

The Declaratory Judgments Act is a development of the old Roman law of procedure, which allowed a judge to decide in a preliminary way certain questions of law and fact which the parties themselves by agreement or the magistrate at the request of either one of the parties might submit to the judge for decision. The decision had the effect of settling the law as it then stood. The exercise of the Declaratory Judgment pro-

cedure constantly grew and in the middle ages the law had so developed that the questions of status and property rights connected therewith and of the validity or invalidity of wills or other legal instruments constituted the principal subjects of declaratory actions.

In an action for a Declaratory Judgment the plaintiff asks a declaration that the defendant has no right as opposed to the plaintiff's privilege; that is to say that the plaintiff is under no duty to the defendant, or that the plaintiff is under an immunity from any power of, or control by the defendant. This, of course, was a violent departure from the Common Law conception of the duty of courts. It was only when some wrong had been perpetrated that the Common Law courts took any judicial notice of the fact. The scope of their judicial functions before the passage of the Declaratory Acts was entirely curative. The purpose of this Act is really to prevent litigation. Under the Act any party to a contract, for instance, may have a judicial construction of the same even before a breach thereof, without undue expense and at a time when the effect of an adverse decision is not likely to prove disastrous. In truth, the Declaratory Judgments Act is nothing more than a bill to make it possible for a citizen to ascertain what are his rights and what are the rights of others before taking steps which might involve him in costly litigation. The purpose of the Act and its effect is to enable the citizen to procure from a court guidance which will keep him out of trouble and to procure that guidance with materially less expense than he would have to incur if he should wait until the trouble came before having recourse to the court.

In order to have recourse to and take advantage of the Declaratory Judgment procedure it is not requisite that any wrong should have been done or any breach committed. It is to prevent and forestall such happenings by a Declaratory Judgment setting forth rights and duties for the guidance of those concerned and indicating the course to be followed, that a remedy is provided by the Act, and thus litigation avoided. The measure is not merely preventive, it is also interpretative. It concerns itself not only with contracts, but with wills and other instruments of writing, with matters of govern-

mental regulation, such as ordinances and the like, with respect to titles of property, and particularly with the status of family relations, man and wife, parent and child, guardian and ward, and also with provisions of trust. In all such cases the Act will be found of benefit. Under the Act the courts will have power to declare rights, status and other legal relations whether or not further relief is or could be demanded and no judgment will be open to the objection that it will be declaratory. It will therefore be binding. In other words, before war is openly declared between parties the courts may decide that there is no occasion therefor. The Uniform Act permits the court to construe a contract either before or after a breach thereof.

In every State of the Union we have always had bills in chancery to construe wills, to perpetuate testimony, to determine questions of title and the removal of a cloud. The Declaratory Judgment is but an enlargement in scope and advantage of such proceedings. There is nothing experimental in the Uniform Act. It has been tested and has proved its worth by many years of constant use in the English speaking courts as well as in the courts of some of the countries of continental Europe.

It does not take anything from the law as it exists today. Every right is preserved and will be enforced. The Declaratory Judgment only increases the court's power for good. As stated in the bill itself:

"This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered."

The Declaratory Judgment may be either affirmative or negative in form and effect; it may determine some right, privilege, power or immunity in the plaintiff, or some duty, no-right, liability or disability in the defendant. The judgment is not based on any wrong already done or any breach committed. It is not required to be executed, as it orders nothing to be done. It simply declares rights and duties so that parties may guide themselves in the proper legal road, and, in fact, and in truth, avoid litigation.

Most men are honest. Law suits for the most part arise from honest differences of opinion between parties as to their rights,

and often arise from honest differences of opinion between their counsel. If the parties could find out their rights before acting, their action generally would conform to their rights. If an attorney had means of ascertaining without waiting for a breach of a contract the rights of his client, his client would be saved loss by acting within his rights. It is to be presumed that each party to a transaction intends to proceed with ordinary honesty and circumspection. But every party is not and cannot be informed as to his rights as well as his duties, and, in the absence of such definite knowledge, grave losses may be, and often are, incurred. As matters stand today litigation must await that loss, and there can be no coming into court to secure a ruling as to the status of liability. It often follows that this litigation, when at length it does come, is vindictive and expensive and that the injurious crimination and recrimination are never forgiven or forgotten. In many cases these unfortunate results would be avoided if recourse could be had, before such loss occurred and litigation arose, to the Declaratory Judgment procedure.

The opportunities for good that thus attach to this new procedure, are so numerous as not to permit a full list being attempted. Instances will occur to every practicing lawyer, and to such laymen as may have experienced the fearful limitations under which modern American courts labor.

In most cases each party to a transac-

tion wishes to do right and act honestly. If at the outset of a controversy over a jural relation, a judgment could be obtained setting forth rights and duties, every one would at once abide the decision, and all hostile litigation and bad feeling would be avoided. It is only because parties are now forced to wait until money loss has been suffered or criminal penalties are involved, before they are permitted to come into court, that so many bitter contests attend proceedings in court. Out of this bitterness, resulting from property interests or personal liability being at stake, we have the practice of cases characterized by ugly charges and counter-charges, criminations and recriminations, false witnesses and perjury. If before injury has been inflicted, the parties could obtain a decision on questions in dispute, much of the undesirable features of present day litigation might be eliminated.

The highest function of the law is the preservation of the peace. The State serves such purpose poorly when it compels a citizen to wait until a difference as to the construction of a contract has developed into a struggle to secure or save valuable property; when it delays a matter of the interpretation of a statute until it involves a fight for liberty.

"A stitch in time saves nine." Nowhere can this homely adage be applied to better advantage than in court affairs. Nowhere has its application been denied except in court. The Declaratory Judgment is "a stitch in time."

TITLE 18
PROPERTY
REVISED UNIFORM DISPOSITION OF
UNCLAIMED PROPERTY ACT
(§ 18-28-201 ET SEQ.)

Prefatory Note

Reason for Proposed Uniform Act

Uniform and comprehensive state legislation dealing with the disposition of unclaimed property should fill a very real need. Present statutory provisions on the subject are exceedingly diverse in character and are often not well formulated. Most states already have statutes dealing with the disposition of unclaimed tangible personal property, the abandonment of which is a more or less obvious fact. In addition, a considerable number of states have statutes dealing with the disposition of unclaimed bank deposits. However, at the time the original Uniform Disposition of Unclaimed Property Act was approved by the Conference in 1954, only ten states had adopted really comprehensive legisla-

tion covering the entire field of unclaimed property. They were: Arkansas, Connecticut, Kentucky, Massachusetts, Michigan, New Jersey, New York, North Carolina, Oregon, and Pennsylvania. However, several other states manifested interest in adopting comprehensive legislation on the subject. In order to provide the states with an act that would promote a fair and adequate treatment of the subject, the Conference drafted and, in 1954, approved the Uniform Disposition of Unclaimed Property Act. This Act was subsequently adopted in Arizona, California, Florida, Idaho, Illinois, Montana, New Mexico, Oregon, Utah, Virginia, Washington, and West Virginia.

Why Revision Is Needed Now

In the operation of the Uniform Disposition of Unclaimed Property Act of 1954 and similar acts, special problems have arisen concerning money orders and traveler's checks, particularly those issued by an organization not properly classified as a "banking or financial institution." The Act was revised, therefore, to take care of these problems.

Section 2 (A.C.A. § 18-28-202) has been amended by adding to the persons covered by the section, the phrase "a business association." In subsection (c) the phrase "money orders" is added to the types of sums payable and a special rule concerning the time at which abandonment is presumed is established for traveler's checks. For all property subject to the section, other than traveler's checks, seven years from the date payable raises the presumption of abandonment but a

longer period, 15 years from the date of issuance, is established for traveler's checks.

Section 11 (A.C.A. § 18-28-211) of the original Act, requiring a report by the holder of abandoned property, is amended to eliminate the requirement of reporting the name and address of the owner with respect to "traveler's checks and money orders." Section 12 (A.C.A. § 18-28-212) of the Act which required notice and publication of lists of abandoned property is also amended to eliminate traveler's checks and money orders from the requirement of publication of a list. Both of these amendments are necessary because of the inability of the issuer of money orders and traveler's checks to know who the holder is in most cases.

Section 13 (A.C.A. § 18-28-213) of the original Act obligating the holder of the

sums to pay or deliver the abandoned property to the state is amended so that the obligation to pay is, in the case of

traveler's checks or money orders, not tied to publication of the list but rather to the filing of the appropriate type of report.

What the Act Does

The Uniform Act is custodial in nature — that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, the owner retains his right of presenting his claim at any time, no matter how remote. State records will have to be kept on a permanent basis. In this respect the measure differs from the escheat type of statute, pursuant to which the right of the owner is foreclosed and the title to the property passes to the state. Not only does the custodial type of statute more adequately preserve the owner's interests, but, in addition, it makes possible a substantial simplification of procedure.

The Act, which consists of thirty-two sections, commences with the usual section on definitions. This is followed by sections 2 (A.C.A. § 18-28-202) through 9 (A.C.A. § 18-28-209) devoted to defining and describing the circumstances under which various classes of property are to be presumed abandoned under the Act. Separate sections deal with property held or owing by banks or other financial organizations, insurance corporations, public utilities, other business associations, trustees in corporate dissolution proceed-

ings, fiduciaries, and state courts and other public agencies. Section 9 (A.C.A. § 18-28-209) is an omnibus section covering all other items held or owing "in the ordinary course of the holder's business." Thereafter comes section 10 (A.C.A. § 18-28-210) which may be regarded as a key section in the Act, for it contains the provisions which preclude the possibility of multiple liability being imposed upon the holder of unclaimed property who happens to be subject to the jurisdiction of two or more states. The remaining sections, 11 (A.C.A. § 18-28-211) through 32 (A.C.A. § 18-28-232), deal principally with procedural matters, including the reporting of unclaimed property, the giving of notice to owners, payment into the custody of the state and various provisions pursuant to which the owner may subsequently present his claim to the state and recover his property.

The Uniform Disposition of Unclaimed Property Act, if adopted by the states, will serve to protect the interests of owners, to relieve the holders from annoyance, expense and liability, to preclude multiple liability, and to give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof.

Why Uniformity Is Necessary

In addition to the general desirability of symmetry in the law for the benefit of persons doing business in more than one state, there is at least one especially important reason for uniform legislation on the subject. Two recent decisions of the United States Supreme Court, *Connecticut Mutual Insurance Co. v. Moore*, 333 U.S. 541, 92 L. Ed. 863 (1947) and *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 95 L. Ed. 1078 (1951), (both of which are explained more fully in the commentary to section 10 (A.C.A. § 18-28-210)) reveal that a troublesome problem of multiple liability for the holder of unclaimed property arises in case two or more states,

each having jurisdiction over such property, enact statutes dealing with the subject. If two such statutes cover the same items of property, and if each state seeks to exercise its jurisdiction, it becomes likely that the holder may be subjected to double, or, perhaps, even more extensive liability for funds in its custody. Or, even though the statutes are so framed as to avoid multiple liability, a "race of diligence" between states having jurisdiction may ensue, with each state trying to reach the funds first. In the 1947 decision in *Connecticut Mutual Insurance Co. v. Moore*, the United States Supreme Court held that the state of New York may take

possession of unclaimed funds due on insurance policies issued to persons in the state of New York, even though the insurance company holder of the funds is domiciled in another state. Jurisdiction is based upon the relationship of the policy holders to the state. Later, in 1951 in the *Standard Oil Company* case, the Court upheld the right of the state of New Jersey, the domicile of the company, to escheat stock and stock dividends belonging

to residents of the state of New York. So jurisdiction can also be based upon the domicile of the holder. These two decisions viewed together reveal the possibilities of multiple liability. Moreover, since federal concepts of jurisdiction may not be preclude multiple liability, it is especially proper and desirable to resort to a uniform state act providing reciprocity. The Uniform Act here submitted deals specifically with this problem.

Comment to Section 2 (A.C.A. § 18-28-202)

Section 2(a) (A.C.A. § 18-28-202(a)) establishes the criteria for the presumption of abandonment of deposits held by banking organizations. Section 2(b) (A.C.A. § 18-28-202(b)) establishes similar criteria for funds paid toward shares or other interests in financial organizations other than banks. Section 2(c) (A.C.A. § 18-28-202(c)) deals with other forms of obligations of both banking and financial organizations, or business associations, and section 2(d) (A.C.A. § 18-28-202(d)) covers the contents of safe deposit boxes and other deposit arrangements. In each instance the jurisdictional test for presumption of abandonment within the enacting state bears direct relationship to events taking place within that state, e.g., deposits "made in this state," funds "paid in this state," written instruments "issued in this state," property removed from safe deposit boxes "in this state." These qualifications are explicitly included both for the legal reason that there must be a jurisdictional basis for the claiming of the property within the state, and also for the practical reason that the presence of the events within the state means that the convenience of various parties in interest will be best served in this way.

Including both the states having general abandoned property laws, and others that deal only with certain specific items of property, some 36 states now have legislation designed to capture dormant bank deposits (see Garrison, "Escheats, Abandoned Property Acts, and their Revenue Aspects," 35 Ky. L.J. 302 (1947)). Section 2 (A.C.A. § 18-28-202) parallels section 300 of the New York Abandoned Property Law which is a general statute, and more or less similar provisions are found in the legislation of Arizona, California, Con-

necticut, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, North Carolina, and Pennsylvania.

Comment should be made concerning the seven-year period, the lapse of which gives rise to the presumption of abandonment. This period is used throughout the Uniform Act and is applied to all types of property, with the exception of traveler's checks, subject to the Act. It is a fact, however, that the various states have adopted different time periods for this purpose. Moreover, in any single state different time periods may be prescribed for different items of property. Possibly differing business practices in various parts of the country will indicate the desirability in some states of the utilization of a period other than seven years in connection with at least some types of property. This may be especially the case with respect to savings bank deposits, for in many states it may be deemed desirable to allow more than seven years, and perhaps allow a longer period of dormancy for such deposits than is allowed in connection with other items of unclaimed property. Because of problems arising under the original Act, the Act is amended to provide a period of 15 years from date of issuance for traveler's checks before abandonment is presumed. Each state may adjust the time period to its own needs, and although a seven-year period, with 15 years for traveler's checks, seems reasonably satisfactory for most purposes for most parts of the country, the benefits of this Uniform Act, particularly the benefits of the reciprocal provisions of section 10 (A.C.A. § 18-28-210), will in no way be diminished by the substitution of some other time periods if deemed more satisfactory in view of the local practices.

Comment should also be made concerning the reference to “deposits” in section 2(b) (A.C.A. § 18-28-202(b)). Normally financial organizations, as that term is defined in this Act, do not receive deposits, but instead they receive funds for the purchase of shares. However, in some states such funds are in fact referred to as “deposits” in the pertinent statutes.

Therefore the word is included in section 2(b) (A.C.A. § 18-28-202(b)), but is set forth in brackets to indicate that it may be eliminated in any state where it is inapplicable.*

*The brackets but not the language were deleted from the Arkansas Code.

Comment to Section 3 (A.C.A. § 18-28-203)

Section 3 (A.C.A. § 18-28-203), dealing with unclaimed funds held by insurance companies, establishes as the jurisdictional test for the purposes of the section the fact that “the last known address, according to the records of the corporation, of the person entitled to the funds is within this state.” For perfectly practical reasons this test differs in coverage from that applied under section 2 (A.C.A. § 18-28-202) to deposits in banks and also under section 5 (A.C.A. § 18-28-205) to undistributed dividends of corporations. In general, insurance companies qualify and are authorized to write insurance in many or most of the states of the Union. Therefore, jurisdiction over such companies as holders of unclaimed property is normally wide-spread throughout the country, thus permitting and suggesting differentiation from ordinary business or industrial corporations and also from

banking organizations. Indeed, reliance upon the state of incorporation or principal place of business of the insurance company to take custody of unclaimed property would be most undesirable, both for the reason that it would concentrate the administrative burdens in the few states that incorporate most of the insurance companies, and also because such reliance would result in the same few states obtaining the use of the bulk of the unclaimed funds regardless of the state of address of the persons entitled thereto. The alternative used in section 3 (A.C.A. § 18-28-203) is preferable, and accordingly, jurisdiction is conferred upon the state of the last recorded address of the person entitled. This practice has been adopted in the states which have most recently enacted legislation of this nature, notably Connecticut, Massachusetts, North Carolina, and Pennsylvania.

Comment to Section 4 (A.C.A. § 18-28-204)

Section 4 (A.C.A. § 18-28-204), dealing with deposits and refunds held by public utilities, establishes as the jurisdictional test the fact that the deposit has been made or the refund has been ordered with respect to utility services “furnished in this state.” A question naturally arises in connection with the utility which does business in two or more states and collects advances or is required to pay refunds in each of the states concerned. Suppose one or more states fail to enact abandoned property legislation. Should the state of incorporation of the utility be empowered to take custody of the windfall in the event other states do not do so?

In answering this question account must be taken of the administrative inconvenience to the state of incorporation if it is obliged to undertake the advertising,

mailing of notices, accounting, etc., for unclaimed funds due to persons who received utility service in other jurisdictions. Moreover, account must be taken of the inconvenience to customers in other states who would be compelled to seek their unclaimed funds from the State Treasurer of a state other than that of their residence. Furthermore, recognizing the desirability of avoiding a windfall by the utility, there is nevertheless a certain lack of equity in the acquisition of funds by a state other than that in which the services were rendered. Weighing these several considerations, and proceeding on the assumption that legislation of the nature of the Unclaimed Property Act will be widely adopted, it seems desirable to base the jurisdictional test in this section upon the fact of rendition of the services “within

the state." This has been done in section 4 (A.C.A. § 18-28-204).

Comment to Section 5 (A.C.A. § 18-28-205)

This section deals with ordinary business and industrial corporations, and their stock and dividends. A corporation may be incorporated and do business in but a single state and at the same time its stock may be owned by residents of many states. Such other states would have no jurisdiction over the corporation such as to permit it to compel reporting unclaimed dividends and delivering custody of property. Hence, for want of a better solution and to prevent a windfall to the corporation, the state of incorporation must as-

sume jurisdiction, unless through the effect of the reciprocal clause in Section 10 (A.C.A. § 18-28-210), its jurisdiction is precluded by virtue of the fact that another state in which the stockholder has his last known address also has jurisdiction over the corporation. Accordingly, a dual jurisdictional test is set up in Section 5 (A.C.A. § 18-28-205) and reliance is placed upon the reciprocal clause of Section 10 (A.C.A. § 18-28-210) to prevent multiple liability.

Comment to Section 9 (A.C.A. § 18-28-209)

Section 9 (A.C.A. § 18-28-209) is the omnibus section covering all other intangible personal property not otherwise covered by the more specific provisions of the Act. It should be noted that to be subject to the section the property must be held or owing in the "ordinary course of the holder's business in the state." A wide variety of items will be embraced under this section, including, by way of illustration, money, stocks, bonds, certificates of membership in corporations, securities, bills of exchange, deposits, interest, dividends, income, amounts due and payable under

the terms of insurance policies not covered by Section 4 (A.C.A. § 18-28-204), pension trust agreements, profit-sharing plans, credit balances on paid wages, security deposits, refunds, funds deposited to redeem stocks, bonds, coupons and other securities, or to make a distribution thereof, together with any interest or increment thereon. If desired, these specific items could readily be written into Section 9 (A.C.A. § 18-28-209) itself, thus perhaps adding to clarity and ready understanding of the coverage of the section, although necessarily at the expense of brevity.

Comment to Section 10 (A.C.A. § 18-28-210)

This is a key section of the Act. If two states, each having contact with the transaction, have each adopted the Act, the jurisdictional test becomes the last known address of the owner. Accordingly, if the holder is within the jurisdiction of the state of last known address, that state takes custody of the unclaimed funds regardless of the domicile of the holder. To illustrate, if a corporation is domiciled in state A but does business in both state A and state B, and if it owes dividends to a person whose last known address is in state B, then without the benefit of Section 10 (A.C.A. § 18-28-210) both states A and B could demand custody of the unclaimed dividends — state A on the basis of corporate domicile, and state B on the basis of the last known address of the

person entitled. However, if Section 10 (A.C.A. § 18-28-210) is adopted in both states, the state of domicile of the corporation would relinquish custody because (1) the last known address of the owner is in state B, (2) the holder is subject to the jurisdiction of state B, (3) the dividends are claimed as abandoned property by state B, and (4) the laws of state B contain the reciprocal provision.

Thus the reciprocal provision serves to avoid the problems of multiple liability and the "race of diligence" made possible by the decisions in *Connecticut Mutual Insurance Co. v. Moore*, 333 U.S. 541, 92 L. Ed. 863 (1946) and *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 95 L. Ed. 1078 (1951). These problems are surely going to arise when two or more states claim the

property under their unclaimed property statutes if no such reciprocity provision is available.

It should be noted that Section 10 (A.C.A. § 18-28-210) does not apply to unclaimed property covered by Section 3 (A.C.A. § 18-28-203) (insurance companies), Section 4 (A.C.A. § 18-28-204) (pub-

lic utilities), and Section 8 (A.C.A. § 18-28-208) (property held by state courts and public officers) for the reason that in each of these instances practical considerations have resulted in limiting the jurisdiction in such manner as to preclude the possibility of multiple state jurisdiction.

Comment to Section 12 (A.C.A. § 18-28-212)

Every effort is made in the Uniform Act to minimize the expense of administration. Not only is there the provision in Section 11 (A.C.A. § 18-28-211) which permits aggregate reporting of claims under \$3.00 in amount, but Section 12 (A.C.A. § 18-28-212) gives the State Treasurer authority to eliminate from the published notices any item of less than \$25 unless he deems such publication to be in the public interest. And finally, notice need not be sent by mail to any person who is entitled to property of the value of less than \$25. Furthermore, it should be noted that the notice published in any

county will include only the names and addresses of the persons who are "entitled to notice within the county." In other words, it is not necessary to go to the expense of listing the names of all persons appearing entitled in each of the counties involved.

Sections 11 (A.C.A. § 18-28-211) and 12 (A.C.A. § 18-28-212) of the 1954 Act are amended to exclude traveler's checks and money orders from the requirements for a report and a list because of the inability of the issuer to know who the holder is in most cases.

Comment to Section 13 (A.C.A. § 18-28-213)

This section of the 1954 Act is amended so that the obligation to pay in the case of traveler's checks or money orders is not

tied to publication of the list but rather to the filing of the appropriate type of report.

Comment to Section 16 (A.C.A. § 18-28-216)

Section 16 (A.C.A. § 18-28-216) treats unclaimed property as subject to the Act even though the period of limitations has run prior to date of presumed abandonment. A special problem is presented that warrants careful consideration in relation to the local law in each state adopting the Uniform Act. The following brief statement of the authorities will be of service.

The Supreme Court has held that, where, under the local law as interpreted by the courts, title to real or personal property has not "vested," the 14th Amendment is not violated by legislation revising a cause of action already barred by the running of the statute of limitations. *Campbell v. Holt*, 115 U.S. 620, 29 L. Ed. 483 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 89 L. Ed. 1628 (1944). However, there are a number of courts which have held that the defense of the statute of limitations creates a vested

right and in that case it cannot be taken away by statute. See cases collected in notes entitled *Power of Legislature to Revive a Right of Action Barred by Limitation*, 36 A.L.R. 1316 (1924); 133 A.L.R. 384 (1940). Comment, *Developments in the Law, Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1178-1190 (1950).

Illustrative of the problem is *Standard Oil Co. v. New Jersey*, 5 N.J. 281 (1950), in which case the defendant raised the defense of the bar of limitations against an action of escheat brought by the state under its general unclaimed property law. The property involved consisted of unpaid stock dividends, shares of stock, unpaid wages, money withheld from wages toward purchase of liberty bonds, money held to pay checks issued by the corporation, and money owing on uncashed bond coupons. The court stated that:

"The principle is imbedded in our ju-

risprudence that where a right of action has become barred under existing law, the statutory defense constitutes a vested right which is proof against legislative impairment."

Under the doctrine of escheat, the court said, the state merely succeeds to the rights of the owner. If such rights have been barred by the statute of limitations, the state has no derivative right because the owner has no right. Thus, the court concluded the state had no right to unpaid wages, money owing on checks, and the money payable on the bond coupons. However, the court decided otherwise as to dividends on stock and money withheld from wages for purchase of bonds, for these, the court said, were in the nature of a trust against which the statute of limitations did not run. Thus the state was enabled to escheat these items.

The New Jersey Legislature has taken action to avoid this decision by revising its escheat law to provide that cash, dividends, interest, and wages owed by a corporation shall be presumed abandoned and delivered to the custody of the state after being unclaimed for five years, instead of the previous period of fourteen years. The new period is shorter than the period of limitations. N.J. Stat., Sec. 2A:37-29 (1951). After two years of custody, the property is escheated to the state. Thus, the statute of limitations with a period exceeding five years will be no defense to an action against a corporation to escheat these items of property.

Each state, in considering the adoption of the Uniform Act, must investigate its own law in the subject to determine whether the bar of the statute of limitations can be lifted. Oklahoma, for instance, appears to have a constitutional prohibition against reviving a cause of action barred by the statute of limitations. *Mines v. Hogan*, 79 Okla. 233, 192 Pac. 811 (1920). If the law of vesting is in accord with that of New Jersey, the solution used by that state may well be desired. Of course, in determining the question of policy, any state may conclude to permit the statute of limitations to serve as a defense. Kentucky has so decided, Ky.

Rev. Stat. (1949), Sec. 393.110. In such case, the problem is eliminated by the holder becoming entitled to the property.

Finally, it should be noted that, in connection with many types of abandoned property, the statute does not run during the period of inactivity which gives rise to the presumption of abandonment. Thus where the claim is against a fiduciary, as with some of the items involved in *Standard Oil Co. v. New Jersey*, supra, or if "demand" is a condition of the owners' right to sue, as in the case of utility deposits and certificates of deposit in banks (see the Uniform Commercial Code, Sec. 3-108(2): "A cause of action on a certificate of deposit does not accrue until demand..."), the problem of removing the bar of the statute will not arise. (See also Comment, Developments in the Law, Statutes of Limitations, supra, pp. 1200 et seq., for general discussion of when the statute begins to run.) In case of insurance policies, the obligation of the company is generally conditioned upon the submission of proof of death or other contingency. Thus it would seem the statute would not begin to run until such proof was submitted. Bank deposits fall into a similar category. Thus it may well be that the bulk of abandoned property falls outside the scope of the statute of limitations problem.

Finally, in connection with the removal of the bar of the statute of limitations, attention must be given to the fact that in connection with certain classes of business transactions, for example, so-called "nominee dividends; in brokers' accounts, reliance may have been placed upon the bar of the statute of limitations and the holder of unclaimed property may have made distribution or otherwise utilized it in some manner which would result in severe prejudice if the bar of the statute were later removed for the purposes of the unclaimed property law. In such instances it may prove necessary to include an exception, either in this section or elsewhere in the Act avoiding hardship by precluding the arising of presumption of abandonment in such cases.

Comment to Section 17 (A.C.A. § 18-28-217)

Because of the considerable number of events involved it may prove helpful to summarize the "time-table" for the disposition of unclaimed property. The steps are as follows:

(1) Filing of report by holder, before November 1, except that insurance companies file before May 1, Section 11(d) (A.C.A. § 18-28-211(d)).*

(2) Publishing notice, 120 days after filing of report, Section 12(a) (A.C.A. § 18-28-212(a)). (Not applicable to traveler's checks or money orders.)

(3) Mailing notice, 120 days after filing of report, Section 12(d) (A.C.A. § 18-28-212(d)). (Not applicable to traveler's checks or money orders.)

(4) Period for owner claiming from holder, 65 days from the date of the second published notice, Section 12(b)(3) (A.C.A.

§ 18-28-212(b)(3)). (Not applicable to traveler's checks or money orders.)

(5) Delivery by holder to State Treasurer, 20 days after expiration of period for claiming from holder, 85 days after date of the second published notice; for traveler's checks or money orders, 20 days after filing of report, Section 13 (A.C.A. § 18-28-213).

(6) Sale by state, within one year after delivery, Section 17 (A.C.A. § 18-28-217).

It should be noted that most of the time-table dates are bracketed, and hence they may be adjusted by any adopting state to the convenience of its own business and administrative practices.

*The May 1 language was deleted from the Arkansas Code.

UNIFORM FEDERAL LIEN REGISTRATION ACT

(§ 18-47-201 ET SEQ.)

Prefatory Note

This Act (A.C.S. § 18-47-201 et seq.) is a successor to the Revised Federal Tax Lien Registration Act as revised by the Conference in 1966 and does not make any drafting changes to the previous Act except as required to prescribe the method of perfecting the employer liability lien, provided by the Pension Reform Act, and any other similar liens.

Since most of the policy decisions made in drafting this Act (A.C.S. § 18-47-201 et seq.) were derived from the Revised Uniform Federal Tax Lien Registration Act as it was revised in 1966, it would appear helpful to include here the Prefatory Note which was included with the earlier act in 1966.

"Section 6323 of the United States Internal Revenue Code of 1954, as amended by P.L. 89-719, Federal Tax Lien Act of 1966 provides that liens for an unpaid federal tax shall not be valid as against mortgagees, pledgees, judgment creditors, purchasers and holders of other security interest until notice of the tax lien has been filed in an office designated by the law of the state in which the property subject to the lien is situated, or, in the absence of a valid state designation, in the federal district court for the place where the property is situated. Under federal law, personal property is deemed situated at the residence of the taxpayer regardless of its physical location.

"Thus the new federal act would invalidate any provision of a state law which required filing of liens for property other than real estate at more than one office or at any state office other than that associated with the residence of the taxpayer. State law requiring filing at the physical location of personal property or at both physical location and residence of the taxpayer is not permissible and if a state law includes such a provision the Internal Revenue Service would, for that state, file liens in the federal district court rather than in a state office.

"The new federal legislation provides for filing of certain types of certificates

and notices affecting previously filed liens which some of the existing state legislation does not provide for. The effectiveness of these additional notices as a communication to interested persons depends on their being filed in the same office where the notice of lien is filed. It is necessary, therefore, that state law be broadened to permit filing and indexing of these additional notices.

"In addition to the above reasons for new state legislation, there is another reason for revising existing state laws concerned with federal tax liens. Many of the existing laws are no longer appropriate in the states (all but three in December, 1966) which have enacted the Uniform Commercial Code. It is highly desirable that the place for filing and searching for federal tax liens be the same place as that designated by the state law under the Uniform Commercial Code for filing and searching for a security interest in the same property. Unfortunately, complete coordination of federal tax lien filing with the rules for filing under the Uniform Commercial Code cannot be fully achieved by state legislation. The United States Supreme Court has held that the Congressional permission to a state to designate the office for filing of federal tax liens cannot be taken advantage of by the states in such a way as to require the federal tax collector to specify the particular property to which the lien applies. *United States v. Union Central Life Insurance Company*, 363 U.S. 291 (1961). The Internal Revenue Service has interpreted this decision to preclude a state requirement for filing federal tax liens in conformity with the Uniform Commercial Code because of the Code's differing requirements for various types of property and its requirement for filing in two offices in some cases. Rev.Rul. 64-170, 1964-1 Cum.Bull. 499. P.L. 89-719 continues this interpretation.

"Nevertheless, it is possible to go a long way toward bringing federal tax lien filing into conformity with the Uniform Com-

mercial Code and it is highly desirable to do so in order to accommodate to commercial convenience so far as possible within the limitations of federal law. States which departed from the uniformity of the Commercial Code by amendment as to the place of filing may now wish to conform their Commercial Code to the original uniform version at the same time they change the federal tax lien requirements. The Act presented here calls for filing on taxpayers who are corporations or partnerships in the office of the Secretary of State and in all other cases in an office in the place where the taxpayer resides. No provision is possible calling for filing of the tax lien at the place where particular kinds of property are physically located.

Any attempt to deviate from the proposed place of filing in this Code risks non-compliance with Federal Law. The federal act does permit filing of notices as to real property in an office at the place where the real property is situated. It has no such permission for other kinds of property. Section 1 of the Act contained herein complies with the federal requirement.

"The present Act was prepared in light of Public Law 89-719 of 1966 amending Section 6323 of the Internal Revenue Code of 1954. The Internal Revenue Service has reviewed the Act and believes it meets the requirement of federal law. The Conference recommends that it be adopted and that existing legislation concerning federal tax liens be repealed."

Comment to Section 1 (A.C.A. § 18-47-201)

This Act (A.C.A. § 18-47-201 et seq.) is a successor to the Revised Federal Tax Lien Registrations Act as revised by the Conference in 1966. The changes made in the previous Act are brought about by the provisions of the Pension Reform Act which prescribes the method of perfecting the employer liability lien to the same as for federal tax liens.

Therefore, the Act has been changed

and now applies to the employer liability lien established by Section 4068(a) of the Pension Reform Act as well as a federal tax lien. Other similar liens that may be perfected like a federal tax lien, such as the provisions for collection of federal fines contained in proposed revisions to the federal criminal laws, are within the scope of this Act (A.C.A. § 18-47-201 et seq.).

Comment to Section 2 (A.C.A. § 18-47-202)

1. In order to accommodate to commercial convenience so far as possible within the limitations of Section 6323 of the Internal Revenue Code, filing with the Secretary of State is provided for the lien on tangible and intangible personal property of partnerships and corporations (as those terms are defined in Section 7701 of the Internal Revenue Code of 1954 and the implementing regulations) thus including within "partnerships" such entities as joint ventures and within "corporations" such entities as joint stock corporations and business trusts.

Because most purchases and secured transactions involving personal property of natural persons relate to consumer goods or farm personal property, searches for liens against those persons are more likely to be made at the local level. Thus, with few exceptions a search for corporation federal tax liens with the Secretary of State and for natural persons with an

officer in the county of residence will normally be in the same office as searches for security interests under the Uniform Commercial Code.

Section 6323 of the Internal Revenue Code "locates" all tangible and intangible personal property at the residence of the taxpayer even though it is physically located elsewhere in the same or in another state. State law cannot vary this requirement. State law does affect the result, however, in that state law determines the "residence" of a taxpayer. See IRC § 6323(f)(2). Filing at the physical location of personal property of a taxpayer who is not a resident of the state of location of the property cannot be required.

2. The coverage of this Act (A.C.A. § 18-47-201 et seq.) now extends beyond federal tax liens as described in the Comment to Section 1 (A.C.A. § 18-47-201).

3. In some jurisdictions, a question may be raised concerning the propriety of

incorporating federal law by reference. In others, the place of filing described in this Act (A.C.A. § 18-47-201 et seq.) may not correspond to the place of filing under the Uniform Commercial Code. Alteration of this Act (A.C.A. § 18-47-201 et seq.) in

these respects may create the peril that the notices will be filed in the federal district court, thus eliminating the benefits of this Act (A.C.A. § 18-47-201 et seq.).

Comment to Section 3 (A.C.A. § 18-47-203)

This section (A.C.A. § 18-47-203) addresses only the validity of the filing and not the validity of the lien.

Comment to Section 4 (A.C.A. § 18-47-204)

1. It is the practice of the Internal Revenue Service to regard a "certificate of discharge" as primarily referable to specific pieces of property, so a certificate of discharge corresponds to a release under Section 9-406 of the Uniform Commercial Code. A "certificate of release" in tax practice is equivalent to a "termination statement" in Section 9-404 of the Uniform

Commercial Code in the sense that it is a general statement applicable to all property or types of property referred to in the termination statement.

2. It is expected that the Pension Benefit Guaranty Corporation will adopt the same practices as the Internal Revenue Service or other practices as the circumstances may require.

Comment to Section 5 (A.C.A. § 18-47-205)

1. It is understood that the Treasury accepts the obligation to pay non-discriminatory filing fees for filing notice of tax liens but desires those payments to be on a monthly billing basis. For notice of tax lien on real property, the filing fee for a real estate mortgage may serve as a standard; for a filing fee on notice of tax lien on personal property the filing fee for filing a financing statement may serve as a standard. There is now no established practice concerning fees for other notices. The certificate of discharge is comparable to a satisfaction of a real estate mortgage and to release of collateral under Section 9-406 of the Uniform Commercial Code. Those instruments are usually filed by persons other than the Treasury, and a filing fee for filing them should be prescribed.

A different problem is presented by certificates of release or non-attachment. Sometimes those certificates serve the purpose of permitting the public filing official to clear his records, and for that

purpose the filing fee perhaps should be low in order to induce filing. Sometimes those notices are filed for purposes of the taxpayer. Given the volume of notices of tax liens which are filed daily in large filing offices, it may serve the public interest to have filed certificates of release. From the standpoint of the Treasury, those certificates serve no important purpose, and the Treasury may not file them if the fee is large. In adoption of this Act (A.C.A. § 18-47-201 et seq.), consideration should be given by the states to providing a substantially smaller fee for filing a certificate of release, so that when a tax case is closed the Treasury will file those releases in a routine manner in order to reduce the storage and administrative problem of the local and state filing officers.

2. It is understood that the Pension Benefit Guaranty Corporation will accept the same obligations as those imposed on the Treasury for federal tax liens.

TITLE 20
PUBLIC HEALTH AND WELFARE
UNIFORM DETERMINATION OF DEATH ACT
(§ 20-17-101)

Prefatory Note

This Act provides comprehensive bases for determining death in all situations. It is based on a ten-year evolution of statutory language on this subject. The first statute passed in Kansas in 1970. In 1972, Professor Alexander Capron and Dr. Leon Kass refined the concept further in "A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal," 121 Pa.L.Rev. 87. In 1975, the Law and Medicine Committee of the American Bar Association (ABA) drafted a Model Definition of Death Act. In 1978, the National Conference of Commissioners on Uniform State Laws (NCCUSL) completed the Uniform Brain Death Act. It was based on the prior work of the ABA. In 1979, the American Medical Association (AMA) created its own Model Determination of Death statute. In the meantime, some twenty-five state legislatures adopted statutes based on one or another of the existing models.

The interest in these statutes arises from modern advances in lifesaving technology. A person may be artificially supported for respiration and circulation after all brain functions cease irreversibly. The medical profession, also, has developed techniques for determining loss of brain functions while cardiorespiratory support is administered. At the same time, the common law definition of death cannot assure recognition of these techniques. The common law standard for determining death is the cessation of all vital functions, traditionally demonstrated by "an absence of spontaneous respiratory and cardiac functions." There is, then, a potential disparity between current and accepted biomedical practice and the common law.

The proliferation of model acts and uniform acts, while indicating a legislative need, also may be confusing. All existing

acts have the same principal goal — extension of the common law to include the new techniques for determination of death. With no essential disagreement on policy, the associations which have drafted statutes met to find common language. This Act contains that common language, and is the result of agreement between the ABA, AMA, and NCCUSL.

Part (1) (A.C.A. § 20-17-101(a)(1)) codifies the existing common law basis for determining death — total failure of the cardiorespiratory system. Part (2) (A.C.A. § 20-17-101(a)(2)) extends the common law to include the new procedures for determination of death based upon irreversible loss of all brain functions. The overwhelming majority of cases will continue to be determined according to part (1) (A.C.A. § 20-17-101(a)(1)). When artificial means of support preclude a determination under part (1) (A.C.A. § 20-17-101(a)(1)), the Act recognizes that death can be determined by the alternative procedures.

Under part (2) (A.C.A. § 20-17-101(a)(2)), the entire brain must cease to function, irreversibly. The "entire brain" includes the brain stem, as well as the neocortex. The concept of the "entire brain" distinguishes determination of death under this Act from "neocortical death" or "persistent vegetative state." These are not deemed valid medical or legal bases for determining death.

This Act also does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in cases of pregnant women or of organ donors, and protection for the dead body. These subjects are left to other law.

This Act is silent on acceptable diagnostic tests and medical procedures. It sets the general legal standard for determin-

ing death, but not the medical criteria for doing so. The medical profession remains free to formulate acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment.

It is unnecessary for the Act to address specifically the liability of persons who make determinations. No person authorized by law to determine death, who makes such a determination in accordance with the Act, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination. No person who acts in good faith, in reliance on a determination of death, should, or will be, liable for damages in any civil action or

subject to prosecution in any criminal proceeding for his acts. There is no need to deal with these issues in the text of this Act.

Time of death, also, is not specifically addressed. In those instances in which time of death affects legal rights, this Act states the bases for determining death. Time of death is a fact to be determined with all others in each individual case, and may be resolved, when in doubt, upon expert testimony before the appropriate court.

Finally, since this Act should apply to all situations, it should not be joined with the Uniform Anatomical Gift Act so that its application is limited to cases of organ donation.

**UNIFORM RIGHTS OF THE
TERMINALLY ILL ACT
(§ 20-17-201 ET SEQ.)**

Prefatory Note

The Rights of the Terminally Ill Act authorizes an adult person to control decisions regarding administration of life-sustaining treatment by executing a declaration instructing a physician to withhold or withdraw life-sustaining treatment in the event the person is in a terminal condition and is unable to participate in medical treatment decisions. As the preceding sentence indicates, the scope of the Act is narrow. It does not address treatment of persons who have not executed such a declaration; it does not address treatment of minors; and it does not address treatment decisions by proxy. Its impact is limited to treatment that is merely life prolonging, and to patients whose terminal condition is incurable and/or irreversible, whose death will soon occur, and who are unable to participate in treatment decisions. Beyond its narrow scope, the Act is not intended to affect any existing rights and responsibilities of persons to make medical treatment decisions. The Act merely provides one way by which a terminally-ill patient's desires regarding the use of life-sustaining procedures can be legally implemented.

The purposes of the Act are (1) to

present an Act which is simple, effective, and acceptable to persons desiring to execute a declaration and to physicians and health-care facilities whose conduct will be affected, (2) to provide for the effectiveness of a declaration in states other than the state in which it is executed through uniformity of scope and procedure, and (3) to avoid the inconsistency in approach which has characterized the early statutes.

The Act's basic structure and substance are similar to that found in most of the existing legislation. The Act has drawn upon existing legislation in order to avoid further complexity and to permit its effective operation in light of prior enactments. Departures from existing statutes have been made, however, in order to simplify procedures, improve drafting, and clarify language. Selected provisions have been reworked to express more adequately a specific concept (i.e., life-sustaining treatment, terminal condition) or to reflect changes in established procedure (i.e., the qualifications of witnesses). The Act's stylistic and substantive departures from existing legislation were pursued for the purposes of clarity and simplicity.

Comment to Section 1 (A.C.A. § 20-17-201)

The Act's definition of "life-sustaining treatment" and "terminal condition" are interdependent and must be read together. This has caused drafting problems in many existing acts, and the Act has been drafted to avoid the problems detected in existing legislation.

Most of the "life-sustaining treatment" and "terminal condition" definitions in existing statutes were considered problematical in that they (1) were tautological, defining "terminal condition" with respect to "life-sustaining treatment" and vice versa, and (2) defined terminal condition as requiring "imminent" death "whether or not" or "regardless of" the application of

life-sustaining treatment. Strictly speaking, if death is "imminent" even with the full application of life-sustaining treatment, there is little point in having a statute permitting withdrawal of such procedures. The Act's definitions have attempted to avoid these problems.

The "life-sustaining treatment" definition found in many statutes inserts the clause "and when, in the judgment of the attending physician, death will occur whether or not such procedure or intervention is utilized," after the phrase "will serve only to prolong the dying process" found in the Act's provision. Because the Act's life-sustaining treatment definition

concerns only those procedures or interventions applied to "qualified patients" (i.e., those who have been determined to be in a terminable condition), and because a terminable condition is defined as "incurable or irreversible" with death resulting "in a relatively short time," the requirement that death be "inevitable" has been satisfied by the presence of "qualified patient" in the life-sustaining treatment definition. Therefore, this additional clause was excluded because it was considered repetitious and possibly confusing.

The Act defines "life-sustaining treatment" in an all-inclusive manner, dealing with those procedures necessary for comfort, care or alleviation of pain separately in Section 6(b) (A.C.A. § 20-17-206), where it is provided that such procedures need not be withdrawn or withheld pursuant to a declaration. Most existing statutes incorporate "comfort care" as an exclusion from the definition of life-sustaining treatment. Because many such procedures are life-sustaining, however, the Act avoids definitional confusion by treating them in a separate provision that reflects the Act's policy more clearly, and better reflects the fact that comfort care does not involve a fixed group of procedures applicable in all instances.

Subsection (9) of Section 1 (A.C.A. § 20-17-201(9)) is the "terminal condition" definition. The difficulty of trying to express such a condition in precise, accurate, but not unduly restrictive language is obvious. A definition must preserve the physicians' professional discretion in making such determinations. Consequently, the Act's definition of terminal condition incorporates not only selected language from various state acts, but also suggestions from medical literature in the field.

The Act employs the term "terminal condition" rather than terminal illness, and it is important that these two different concepts be distinguished. Terminal illness, as generally understood, is both broader and narrower than terminal condition. Terminal illness connotes a disease process that will lead to death; "terminal condition" is not limited to disease. "Terminal illness" also connotes as inevitable process leading to death, but does not contain limitations as to the time period prior to death, or potential for

nonreversibility, as does "terminal condition."

The terminal condition definition requires that the condition be "incurable or irreversible." These adjectives were chosen over the similar phrase, "no possibility of recovery," because of possible ambiguity in the term "recovery" (i.e., recovery to "normal" or to some other stage). A number of state statutes now use "incurable" and/or "irreversible," and the terms appear to comport with the criteria applied by physicians in terminal care situations. The phrase "incurable or irreversible" is to be read conjunctively when the circumstances warrant. A condition which is reversible but incurable is not a terminal condition.

Subsection (9) (A.C.A. § 20-17-201(9)) also requires that the condition result in the death of the patient within a "relatively short time ... without the administration of life-sustaining treatment." This requirement differs to some degree from the language employed in most of the statutes. First, the decision that death will occur in a relatively short time is to be made without considering the possibilities of extending life with life-sustaining treatment. The alternative is that required by a number of states — that death be imminent whether or not life-sustaining procedures are applied. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research has noted that such a definition severely limits the group of terminally-ill patients able to qualify under these acts. It is precisely because life can be prolonged indefinitely by new medical technology that these acts have come into existence. Though the Act intends to err on the side of prolonging life, it should not be made wholly ineffective as to the actual situation it purports to address. The provisions which require that death be imminent regardless of the application of life-sustaining procedures appear to have that effect. Therefore, such provisions have been excluded in the Act.

The terminal condition definition of Subsection (9) (A.C.A. § 20-17-201(9)) requires that death result "in a relatively short time." Rejecting the "imminency" language employed in a number of statutes, this alternative was chosen because it provides needed flexibility and reflects the balancing character of the time frame

judgment. Though the phrase, “relatively short time,” does not eliminate the need for judgment, it focuses the physician’s medical judgment and avoids the narrowing implications of the word “imminent.”

The “relatively short time” formulation is employed to avoid both the unduly constricting meaning of “imminent” and the artificiality of another alternative — fixed time periods, such as 6 months, 1 year, or the like. The circumstances and inevitable variations in disorder and diagnosis make unrealistic a fixed time period. Physicians may be hesitant to make predictions under a fixed time period standard unless the standard of physician judgment is so loose as to be unenforceable. Under the Act’s standard, considerations such as the strength of the diagnosis, the type of the disorder, and the like

can be reflected in the judgment that death will result within a relatively short time, as they are now reflected in judgments physicians must and do make.

The life-sustaining treatment and terminal condition definitions exclude certain types of disorders, such as kidney disease requiring dialysis, and diabetes requiring continued use of insulin. This is accomplished in the requirement that the terminal conditions be “irreversible,” and that life-sustaining procedures “serve ‘only to prolong the dying process.’” For purposes of the Act, diabetes treatable with insulin is “reversible,” a diabetic person so treatable is not in the “dying process,” and insulin is a treatment the benefits of which foreclose it serving “only” to prolong the dying process.

Comment to Section 2 (A.C.A. § 20-17-202)

Section 2 (A.C.A. § 20-17-202) sets out the minimal requirements regarding the making and executing of a valid declaration. A “sample” declaration form is offered in this section. The form is not mandatory, as some acts require; it “may, but need not be” followed. The form provided also is not as elaborate as others. The drafters rejected a more detailed declaration for two reasons. First, the form is to serve only as an example of a valid declaration. A more elaborate form may have erroneously implied that a declaration more simply constructed would not be legally sufficient. Second, the sample form’s simple structure and specific language attempts to provide notice of exactly what is to be effectuated through these documents to those persons desiring to execute a declaration and the physicians who are to honor it.

The Act’s provisions governing witnesses to a declaration have also been simplified. Section 2 (A.C.A. § 20-17-202) provides only that the declaration be signed by the declarant in the presence of two witnesses. The Act does not require witnesses to meet any specific qualifications for two primary reasons. First, the interest in simplicity mandates as uncomplicated a procedure as possible. It is intended that the Act present a viable alternative for those persons interested in participating in their medical treatment

decisions in the event of a terminal condition.

Second, the absence of more elaborate witness requirements relieves physicians of the inappropriate and perhaps impossible burden of determining whether the legalities of the witness requirements have been met. Many physicians understandably and rightly would be hesitant to make such decisions and, therefore, the effectiveness of the declaration might be jeopardized. It should be noted, as well, that protection against abuse in these situations is provided by the criminal penalties in Section 9 (A.C.A. § 20-17-209). The attending physicians and other health care professionals will be able, in most circumstances, to discuss the declaration with the patient and family and any suspicion of duress or wrongdoing can be discovered and handled by established hospital procedures.

Section 2(c) (A.C.A. § 20-17-202(d)) requires that a physician or health-care provider who is given a copy of the declaration record it in the declarant’s medical records. This step is critical to the effectuation of the declaration, and the duty applies regardless of the time of receipt. If a copy of the same declaration is already in the record, its re-recording would not be necessary, but its receipt should be noted as evidence of its continued force. Section 2(c) (A.C.A. § 20-17-202(d)) is not dupli-

cative of Section 5 (A.C.A. § 20-17-205) which requires recording the terms of the declaration (or the document itself, when available, in the event of telephonic communication to the physician by another physician, for example) at the time the physician makes a determination of terminal condition. It was deemed important that knowledge of the declaration and its continued force be specifically noted at this critical juncture.

Section 2(c) (A.C.A. § 20-17-202(d)) im-

poses a duty on the physician or other health-care provider to inform the declarant of his or her unwillingness to comply with the provisions of the declaration. This will provide notice to the declarant that certain terms may be deemed medically unreasonable (Section 10(f) (A.C.A. § 20-17-210(f))), or that a different provider who is willing to carry out the Act (Section 7 (A.C.A. § 20-17-207)) should be informed of the declaration.

Comment to Section 3 (A.C.A. § 20-17-203)

Section 3 (A.C.A. § 20-17-203) establishes the preconditions to the declaration becoming operative. Once operative, Section 3 (A.C.A. § 20-17-203) provides that the attending physician shall act in accordance with the provisions of the declaration or transfer care of the patient under Section 7 (A.C.A. § 20-17-207). This provision is not intended to eliminate the physician's need to evaluate particular requests in terms of reasonable medical

practice under Section 10(f) (A.C.A. § 20-17-210(f)), nor to relieve the physician from carrying out the declaration except for any specific unreasonable or unlawful request in the declaration. Transfer of the patient under Section 7 (A.C.A. § 20-17-207) is to occur if the physician, for reasons of conscience, for example, is unwilling to carry out the Act or to follow medically reasonable requests in the declaration.

Comment to Section 4 (A.C.A. § 20-17-204)

Section 4 (A.C.A. § 20-17-204) provides for revocation of a declaration and is modeled after North Carolina's similar provision. Virtually every other statute sets out specific examples of how a declaration can be revoked — by physical destruction, by a signed, dated writing, or by a verbal expression of revocation. A provision that freely allowed revocation and avoided procedural complications was desired. The simple language of Section 4 (A.C.A. § 20-17-204) appears to meet these qualifications. It should be noted that the revocation is, of course, not effective until communicated to the attending physician or another health-care provider working under a physician's guidance, such as

nursing facility or hospice staff. The Act, unlike many statutes, also does not explicitly require that a person relaying the revocation be acting on the declarant's behalf. Such a requirement could impose an unreasonable burden on the attending physician. The communication is assumed to be in good faith, and the physician may rely on it.

In employing a general revocation provision, it was intended to permit revocation by the broadest range of means. Therefore, for example, it is intended that a revocation can be effected in writing, orally, by physical defacement or destruction of a declaration, and by physical sign communicating intention to revoke.

Comment to Section 5 (A.C.A. § 20-17-205)

Section 5 (A.C.A. § 20-17-205) of the Act requires that an attending physician record the determination that the patient is in a terminal condition in the patient's medical records. The section provides that an attending physician must know of the declaration's existence. It is anticipated that knowledge may in some instances

occur through oral communication between physicians. If the attending physician determines that the patient is in a terminal condition and has been notified of the declaration, the physician is to make the determination of terminal condition, as defined in Section 1(8)*, part of the patient's medical records. There is no

explicit requirement that the physician inform the patient of the terminal condition. That decision is to be left to the physician's professional discretion under existing standards of care. The Act also does not require, as do many statutes, that a physician other than the attending physician concur in the terminal condition determination. It appears to be the established practice of most physicians to request a second opinion or, more often, review by a panel or committee established as a matter of hospital procedure, and the Act is not intended to discourage such a practice. Requiring it, however, would almost inevitably freeze in a single process or set of processes for review in this evolving area of medicine. Because existing policies and regulations typically address the review issue, requiring a specific form of review in the Act was viewed as an unnecessary regulation of normal hospital procedures. Moreover, in smaller or rural health facilities a second qualified

physician or review mechanism may not be readily available to confirm the attending physician's determination.

The physician must record the terms of the declaration in the medical record so that its specific language or any special provisions are known at later stages of treatment. It is assumed that "terms" of the declaration will be a copy of the declaration itself in most instances, although cases of an emergency character may arise, for example, in which the contents of a declaration can be reliably conveyed, and where obtaining a copy of the declaration prior to making decisions governed by it will be impracticable. In such cases, the terms of the declaration will suffice for recording purposes under Section 5 (A.C.A. § 20-17-205).

* Section 1(9), not Section 1(8), defines the terminal condition.

Comment to Section 6 (A.C.A. § 20-17-206)

Section 6(a) (A.C.A. § 20-17-206(a)) recognizes the right of patients who have made a declaration and are determined to be in a terminal condition to make decisions regarding use of life-sustaining procedures. Until unable to do so, such patients have the right to make such decisions independently of the terms of the declaration. In affording patients a "right to make decisions regarding use of life-sustaining procedures," the Act is intended to reflect existing law pertaining to this issue. As Section 10(e) (A.C.A. § 20-17-210(e)) and (f) (A.C.A. § 20-17-210(f)) indicate, qualifications on a patient's right to force the carrying out of those decisions in a manner contrary to law or accepted standards of medical practice, for example, are not intended to be overridden.

In Section 6(b) (A.C.A. § 20-17-206(b)) the Act uses the term "comfort care" in defining procedures that may be applied notwithstanding a declaration instructing withdrawal or withholding of life-sustaining treatment. The purpose for permitting continuation of life-sustaining treatment deemed necessary for comfort care or alleviation of pain is to allow the physician to take appropriate steps to insure comfort and freedom from pain, as dictated by

reasonable medical standards. Many existing statutes employ the term "comfort care" in connection with the alleviation of pain, and the Act follows this example. Although the phrase "to alleviate pain" arguably is subsumed within the term comfort care, the additional specificity was considered helpful for both the doctor and layperson.

Section 6(b) (A.C.A. § 20-17-206(b)) does not set out a separate rule governing the provision of nutrition and hydration. Instead, each is subject to the same considerations of necessity for comfort care and alleviation of pain as are all other forms of life-sustaining treatment. If nutrition and hydration are not necessary for comfort care or alleviation of pain, they may be withdrawn. This approach was deemed preferable to the approach in a few existing statutes, which treat nutrition and hydration as comfort care in all cases, regardless of circumstances, and exclude comfort care from the life-sustaining treatment definition.

It is debatable whether physicians or other professionals perceive the providing of nourishment through intravenous feeding apparatus or nasogastric tubes as comfort care in all cases or whether such

procedures at times merely prolong the dying process. Whether procedures to provide nourishment should be considered life-sustaining treatment or comfort care appears to depend on the factual circumstances of each case and, therefore, such decisions should be left to the physician, exercising reasonable medical judgment. Declarants may, however, specifically express their views regarding continuation or noncontinuation of such procedures in the declaration, and those views will control.

Section 6(c) (A.C.A. § 20-17-206(c)) addresses the problem of a qualified patient who is pregnant. The states which address this issue typically require that the declaration be given no force or effect during the pregnancy. Because this requirement inadvertently may do more harm than good to the fetus, Section 6(c) (A.C.A. § 20-17-206(c)) provides a more suitable, if more complicated, standard. It is possible to hypothesize a situation in which life-sustaining treatment, such as

medication, may prove possibly fatal to a fetus which is at or near the point of viability outside the womb. In such cases, the Act's provision would permit the life-sustaining treatment to be withdrawn or withheld as appropriate in order best to assure survival of the fetus. Also, for example, if the qualified patient is only a few weeks pregnant and the physician, pursuant to reasonable medical judgment, determines that it is not probable that the fetus could develop to a point of viability outside the womb even with application of life-sustaining treatment, such treatment may also be withheld or withdrawn. Thus, the pregnancy provision attempts to honor the terminally-ill patient's right to refuse life-sustaining treatment without jeopardizing in any respect the likelihood of life for the fetus. The declaration can, however, specifically address this issue, and should control the treatment provided, whether it calls for continuation of life-sustaining treatment in all cases, or in none.

Comment to Section 7 (A.C.A. § 20-17-207)

Section 7 (A.C.A. § 20-17-207) is designed to address situations in which a physician or health-care provider is unwilling to make and record a determination of terminal condition, or to respect the medically reasonable decisions of the patient regarding withholding or withdrawal of life-sustaining procedures, due

to personal convictions or policies unrelated to medical judgment called for under the Act. In such instances, the physician or health-care provider must promptly take all responsible steps to transfer the patient to another physician or health-care provider who will comply with applicable provisions of the Act.

Comment to Section 8 (A.C.A. § 20-17-208)

Section 8 (A.C.A. § 20-17-208) provides immunities for persons acting pursuant to the declaration and in accordance with the Act. Immunities are extended in Section 8(a) (A.C.A. § 20-17-208(a)) to physicians as well as persons operating under the physician's direction or with the physician's authorization, and to facilities in which the withholding or withdrawal of life-sustaining procedures occurs. Section 8(b) (A.C.A. § 20-17-208(b)) serves both to immunize physicians from liability as

long as reasonable medical judgment is exercised, and to impose "reasonable medical standards" as the criterion that should govern all of the specific medical decisions called for throughout the Act. Section 8(b) (A.C.A. § 20-17-208(b)), in conjunction with Section 10(f) (A.C.A. § 20-17-210(f)), therefore, avoids the need to restate the medical standard in each section of the act requiring a medical judgment.

Comment to Section 9 (A.C.A. § 20-17-209)

Section 9 (A.C.A. § 20-17-209) provides criminal penalties for specific conduct that violates the Act. Subsections (a) (A.C.A. § 20-17-209(a)) and (b) (A.C.A. § 20-17-209(b)) provide that a physician's failure to transfer a patient or record the diagnosis of terminal condition constitutes a misdemeanor. Subsection (c) (A.C.A. § 20-17-209(c)) makes certain willful actions which could result in the unauthorized prolongation of life a misdemeanor. Subsection (d) (A.C.A. § 20-17-209(d)) governs acts which are intended to cause the unauthorized withholding or withdrawal of life-sustaining treatment, thereby advancing death. Subsections (e) (A.C.A. § 20-17-209(e)) and (f) (A.C.A. § 20-17-209(f)) concern situations that may be coercive, and therefore are against public policy.

Some of the criminal penalties — particularly Subsection (d) (A.C.A. § 20-17-209(d)) — depart significantly from most existing statutes. Most statutes provide

penalties for intentional conduct that actually causes the death of a declarant, and define such conduct as murder or a high degree felony. The Act does not take this approach. Assuming that such conduct will already be covered by a state's criminal statutes, the Act only addresses the situations in which the actor willfully falsifies or forges the declaration of another or conceals or withholds knowledge of revocation. To be criminally sanctioned as a misdemeanor under the Act the circumscribed conduct need not cause the death of a declarant. The approach taken by most states, that of providing a felony penalty for those acts that actually caused death, was considered unnecessary, as existing criminal law will also apply pursuant to Section 9(g) (A.C.A. § 20-17-209(g)). A specific penalty for the conduct described in Section 9(d) (A.C.A. § 20-17-209(d)), however, was deemed appropriate, as existing criminal codes may not adequately address it.

Comment to Section 12 (A.C.A. § 20-17-212)

Section 12 (A.C.A. § 20-17-212) provides that a declaration executed in another state, which meets the execution requirements of that other state or the enacting state (adult, two witnesses, vol-

untary), is to be treated as validly executed in the enacting state, but its operation in the enacting state shall be subject to the substantive policies in the enacting state's law.

UNIFORM ANATOMICAL GIFT ACT

(§ 20-17-601 ET SEQ.)

Prefatory Note

The Uniform Anatomical Gift Act (A.C.A. § 20-17-601 et seq.) was promulgated in 1968. It has been adopted in all 50 states and the District of Columbia. In the prefatory note it was observed:

"...if utilization of bodies and parts of bodies is to be effectuated, a number of competing interests in a dead body must be harmonized, and several troublesome legal questions must be answered.... Both the common law and the present statutory picture is one of confusion, diversity, and inadequacy. ... The Uniform Anatomical Gift Act herewith presented by the National Conference of Commissioners on Uniform State Laws carefully weighs the numerous conflicting interests and legal problems. Wherever adopted it will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures. ... It will provide a useful and uniform legal environment throughout the country for this new frontier of modern medicine."

The contemporary significance of the Uniform Anatomical Gift Act (A.C.A. § 20-17-601 et seq.) has been recently assessed by the Hastings Center; in the Preface to its Report of the project on organ transplantation, *"Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement"* (October, 1985), it is stated:

"The issue of transplantation remained quiescent for many years. It was only with the successes occasioned by the introduction of powerful new immunosuppressive drugs such as Cyclosporine and improvements in surgical techniques for transplanting organs and tissues in the past few years that the issue of organ procurement was brought back into the center stage of public policy concern. Enhancements in the capacity to

perform transplants increased the demand for solid organs. It has become apparent that the public policy instituted in 1969 [by promulgation of the Uniform Anatomical Gift Act in 1968] is not producing a sufficient supply of organs to meet the current or projected demand for them."

A 1985 Gallup Poll commissioned by the American Council on Transplantation reported that 93 percent of Americans surveyed knew about organ transplantation and, of these, 75 percent approved of the concept of organ donation. Although a large majority approves of organ donation, only 27 percent indicate that they would be very likely to donate their own organs, and only 17 percent have actually completed donor cards. Of those who were very likely to donate, nearly half have not told family members of their wish, even though family permission is usually requested before an organ is removed. (Report of the Task Force on Organ Transplantation pursuant to the 1984 National Organ Transplant Act—P.L. 98-507—"Organ Transplantation: Issues and Recommendations" (April 1986)).

The inadequacies in the present system of encouraging voluntary donation of organs were enumerated in the Hastings Center Report:

"The key problems that hinder organ donation include:

1. Failure of persons to sign written directives.
2. Failure of police and emergency personnel to locate written directives at accident sites.
3. Uncertainty on the part of the public about circumstances and timing of organ recovery.
4. Failure on the part of medical personnel to recover organs on the basis of written directives.
5. Failure to systemically approach family members concerning donation.
6. Inefficiency on the part of some or-

gan procurement agencies in obtaining referrals of donors.

7. High wastage rates on the part of some organ procurement agencies in failing to place donated organs.

8. Failure to communicate the pronouncement of death to next of kin.

9. Failure to obtain adequate informed consent from family members."

State and federal legislation have addressed several of these problems. For example, a majority of states have enacted a variety of "required request" laws that require hospital administrators to discuss with next of kin the option of donating, or requesting the donation of, the organs of a decedent. Congress enacted the National Organ Transplant Act in 1984 prohibiting the purchase of organs in interstate commerce and providing grants to organ procurement agencies and a national organ-sharing system. The Act also provides for appointment of a Task Force on Organ Transplantation to conduct a comprehensive examination of organ donation and procurement, organ sharing within the United States, access by patients to donor organs and transplant procedures, diffusion and adoption of organ transplant technology, and future directions in research. The Task Force submitted a report in April 1986 entitled "Organ Transplantation: Issues and Recommendations." Among the findings:

"An overriding problem common to all organ transplantation programs as well as to the well-established programs in tissue banking (for corneal, skin and bone transplantation) is the serious gap between the need for the organs and tissues and the supply of donors. Despite substantial support for transplantation and a general willingness to donate organs and tissues after death, the demand far exceeds the supply. At any one time, there are an estimated 8,000 to 10,000 people waiting for a donor organ to become available."

Citing a recommendation of the Task Force, the bill for the reconciliation of the 1987 budget amended the Social Security Act to require that hospitals, as a condition to receiving Medicare or Medicaid after October 1, 1987, establish written protocols "for the identification of poten-

tial organ donors that [make families] ... aware of the option of organ or tissue donation and their option to decline." (P.L. 99-509 § 9318).

Several amendments to the Uniform Act (A.C.A. § 20-17-601 et seq.) have been made since it was promulgated in 1968. In 1980, the NCCUSL voted to make optional the language that previously required the donor card to be signed "in the presence of two witnesses who must sign the document in his presence." Amendments have been made by several states authorizing individuals other than doctors to remove eyes and to address specific emerging problems. As a result, the objective of the 1968 Uniform Act has been eroded, i.e., "When generally adopted, even if the place of death, or the residence of the donor, or the place of use of the gift occurs in a state other than that of the execution of the gift, uncertainty as to the applicable law will be eliminated and all parties will be protected."

In 1984, the Executive Committee of NCCUSL approved the appointment of a study committee, and then in 1985 of a drafting committee, to propose amendments to the Uniform Anatomical Gift Act (A.C.A. § 20-17-601 et seq.). The Committee has consulted with individuals and national organizations involved in organ procurement about possible changes in the generic provisions of the Uniform Act (A.C.A. § 20-17-601 et seq.) and to solicit comments and suggestions. A first draft of proposed amendments to the Uniform Act (A.C.A. § 20-17-601 et seq.) was considered at the annual meeting of NCCUSL in 1986.

The sequence of sections in the original Act has been changed, to combine the concept of "persons who may make an anatomical gift" (original Section 2), "manner of making anatomical gifts" (original Section 4), and "amendment or revocation of the gift" (original Section 6). The authorization of gifts by next of kin or a guardian of the person contained in Section 2 of the original Act is Section 3 (A.C.A. § 20-17-603) of the amended Act (A.C.A. § 20-17-601 et seq.). Several subsections of the original Act have been shifted to accommodate change in title and sequential arrangement of sections of the Act (A.C.A. § 20-17-601 et seq.) as amended. These changes are noted in the Comments. The scope of the Act (A.C.A.

§ 20-17-601 et seq.) continues to be limited to procurement. It does not cover processing except for a provision requiring coordination of procurement and utilization between hospitals and procurement organizations (Section 9) (A.C.A. § 20-17-609). It does not cover distribution except for a provision prohibiting sale or purchase (Section 10) (A.C.A. § 20-17-610).

The proposed amendments simplify the manner of making an anatomical gift and require that the intentions of a donor be followed. For example, no witnesses are required on the document of gift (Section 2(b)) (A.C.A. § 20-17-602(b)) and consent of next of kin after death is not required if the donor has made an anatomical gift (Section 2(h)) (A.C.A. § 20-17-602(h)). The identification of actual donors is facilitated by a duty to search for a document of gift (Section 5(c)) (A.C.A. § 20-17-605(c)) and of potential donors by the provisions for routine inquiry (Section 5(a)) (A.C.A. § 20-17-605(a)) and required request (Section 5(b)) (A.C.A. § 20-17-605(b)). A gift of one organ, e.g., eyes, is not a limitation on the gift of other organs after death, in the absence of contrary indication by the decedent (Section 2(j)) (A.C.A. § 20-17-602(j)). The right to refuse to make an anatomical gift and the manner of expressing the refusal are specified (Section 2(i)) (A.C.A. § 20-17-602(i)). Revocation by a donor of an anatomical gift that has been made is effective without communication of the revocation to a specified donee (Section 2(f)) (A.C.A. § 20-17-602(f)). Hospitals have been substituted for attending physicians as donees of anatomical gifts (Section 6(b)) (A.C.A. § 20-17-606(b)), and they are required to establish agreements or affiliations with other hospitals and procurement organizations in the region to coordinate the procurement and utilization of anatomical gifts (Section 9) (A.C.A. § 20-17-609). If a

request for an anatomical gift has been made for transplant or therapy by a person specified in the Act (A.C.A. § 20-17-601 et seq.) and if there is no contrary indication by the decedent or known objection by the next of kin to an anatomical gift, the [coroner] [medical examiner] or [local public health official] may authorize release and removal of a part subject to specific requirements (Section 4(a) and (b)) (A.C.A. § 20-17-604(a) and (b)). The categories of persons that may remove anatomical parts are expanded to include eye enucleators and certain technicians (Section 8(c)) (A.C.A. § 20-17-608(c)). The sale or purchase of parts is prohibited (Section 10) (A.C.A. § 20-17-610). Persons who act, or attempt to act, in good faith in accordance with the terms of the Act are not liable in any civil action or criminal proceeding. The categories of persons covered by this exemption are specified (Section 11(c)) (A.C.A. § 20-17-611(c)).

The growing promise of transplantation was described in the Hastings Center Report:

"It is now possible to transplant vital organs such as hearts, livers and kidneys. Efforts are currently underway to perfect the transplantation of the heart and lung together, the pancreas and the small bowel. Post-mortem donors of these vital organs must have sustained brain death under circumstances in which their respiration and circulation can be supported artificially.

"Other human tissue such as corneas, bone and inner ear parts and skin can be utilized to restore important biological functions. These tissues may be removed some time after circulation and respiration have ceased. The cornea, for example, remains suitable for removal for transplantation for approximately six hours after the donor's heart has stopped beating."

Comment to § 1 (A.C.A. § 20-17-601)

This is Section 1 of the original Act. Definitions (1) "Anatomical Gift" and (3) "Document of Gift" (A.C.A. § 20-17-601(1) and (3)) have been added to reduce the length and complexity of operative provisions of the Act.

In subsection (2) (A.C.A. § 20-17-601(2)) the committee decided it was un-

necessary to expand the definition of "decedent" to include the definition of death contained in the Uniform Determination of Death Act. That Act provides:

"An individual who has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of

the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."

Almost all states have similar definitions either by statute or appellate court decisions.

The Report to Congress of the Task Force appointed under the 1984 National Organ Transplant Act (P.L. 98-507) recommends:

"... that the Uniform Determination of Death Act be enacted by the legislatures of states that have not adopted this or a similar act. ... that each state medical association develop and adopt model hospital policies and protocols for the determination of death based upon irreversible cessation of brain function that will be available to guide hospitals in developing and implementing institutional policies and protocols concerning brain death."

In subsections (5) and (12) (A.C.A. § 20-17-601(5) and (12)), the individuals autho-

rized to remove a part have been expanded to include enucleators for eyes and technicians. Satisfactory completion of a prescribed course of training and experience is a prerequisite to certification of these nonphysician specialists. The type of certification and the person making it are bracketed. It may be done by a professional peer group organization, an organ procurement organization, agency or association, or by a hospital or state agency.

In subsection (10) (A.C.A. § 20-17-601(10)), "procurement organization" has been substituted for "bank or storage facility" and the function has been expanded to include procurement and distribution to reflect the diffusion of function, i.e., procurement, distribution or storage, and of objective, i.e., organs, tissues, eyes, bones, skin, fluids, etc. In the case of solid or visceral organs, they must be removed while bodily functions of the decedent are sustained with life support systems. If solid or visceral organs are not involved, life support systems are not required, although there are time limits following death within which removal must be completed, e.g., six hours in the case of eyes.

Comment to § 2 (A.C.A. § 20-17-602)

The major structural changes from the original Act are found in Sections 2 and 3 (A.C.A. §§ 20-17-602 and 20-17-603). The persons who may make an anatomical gift are divided into the individual donor (new Section 2) (A.C.A. § 20-17-602) and next of kin or guardians of the person (new Section 3) (A.C.A. § 20-17-603). The manner of executing (old Section 4), and amending or revoking (old Section 6) anatomical gifts are incorporated in new Section 2 (A.C.A. § 20-17-602) as well as provisions of other sections that involve "making, amending, revoking, and refusing to make anatomical gifts by the individual." Provisions of old Section 2 that do not relate directly to this topic have been shifted to later sections. In the original Act there is the following Comment:

"To minimize confusion there is merit in having a uniform provision throughout the country. Also it is desirable to enlarge the class of possible donors as much as possible. Subsection (a) of Section 2, providing that any person of sound mind and 18 years or more of age

may execute a gift, will afford both nationwide uniformity and a desirable enlargement of the class of donors. Persons 18 years of age or more are of sufficient maturity to make the required decisions and the Uniform Act takes advantage of this fact."

In subsection (a) (A.C.A. § 20-17-602(a)) the Act (A.C.A. § 20-17-602) has been expanded by inserting the right to refuse to make an anatomical gift. The absence of a donor card or the lack of an entry authorizing a gift on a driver's license are ambiguous and are not "contrary indications" of a decedent preventing an anatomical gift by next of kin under Section 2(b) of the original Act. This amendment and a provision specifying the manner of making a refusal (subsection (i)) (A.C.A. § 20-17-602(i)) provide the option to individuals who are definitely opposed to the donation for any purpose or of any part of their body as an anatomical gift. If the donor wishes to limit the anatomical gift to a specific purpose, e.g., transplantation, or to a specified part,

e.g., eyes, the limitation must be stated clearly, i.e., “transplantation only,” “eyes only.”

Subsection (b) (A.C.A. § 20-17-602(b)) incorporates the provisions of Section 4(b) of the original Act. Section 4(a) of the original Act has been relocated to subsection (e) (A.C.A. § 20-17-602(e)) to reflect the change from using wills to choosing other forms of documents of gift to make anatomical gifts.

The requirement of two witnesses signing a donor card or other document of gift has been deleted to simplify the making of anatomical gifts. Self authentication of a document of gift by a donor who cannot sign relieves the donee of the duty to search for the witnesses upon death of the donor.

In the original Act there were several forms included in the Comments with this admonition:

“As the Uniform act becomes widely accepted it will prove helpful if the forms by which gifts are made are similar in each of the participating states. Such forms should be as simple and understandable as possible.”

The forms in these Comments are suggested for the 1987 act.

Anatomical Gift By a Living Donor

Pursuant to the Anatomical Gift Act, upon my death, I hereby give (check boxes applicable):

1. ☐ Any needed organs, tissues, or parts;
2. ☐ The following organs, tissues or parts only _____;
3. ☐ For the following purposes only _____

(Transplant-therapy-research-education)

_____ Date of Birth	_____ Signature of Donor
_____ Date Signed	_____ Address of Donor

INSTRUCTIONS

Check box 1 if the gift is unrestricted, i.e., of any organ, tissue, or part for any purpose specified in the Act; do not check box 2 or box 3. If the gift is restricted to specific organ(s), tissue(s), or part(s) only, e.g., heart, cornea, etc., check box 2 and

write in the organ or tissue to be given. If the gift is restricted to one or more of the purposes listed, e.g., transplant, therapy, etc., check box 3 and write in the purpose for which the gift is made.

A gift category included in some forms “of my body for anatomical study if needed” has not been included. Although a gift of the entire body is authorized by the Act, the exercise of this option usually requires an agreement with a medical school before a gift is made.

A simple form of refusal under the Act could provide:

Pursuant to the Anatomical Gift Act, I hereby refuse to make any anatomical gift.

_____ Date of Birth	_____ Signature of Donor
_____ Date Signed	_____ Address of Donor

Subsection (c) (A.C.A. § 20-17-602(c)) incorporates an amendment to the original Act in many states providing that an anatomical gift may be made by an attachment to the driver’s license. The cross reference to subsection (b) (A.C.A. § 20-17-602(b)) incorporates the concept that a signature is required. A signature on the driver’s license or on the card attached to the driver’s license is sufficient. The hospital or other donee may rely on the anatomical gift even though the license has expired or has been terminated by official act.

The following form is suggested for attachment to the driver’s license:

_____ Print or Type Name of Donor	
Pursuant to the Anatomical Gift Act, upon my death, I hereby give (check boxes applicable):	
1. <input type="checkbox"/> Any needed organs, tissues, or parts;	
2. <input type="checkbox"/> The following organs, tissues, or parts only _____;	
3. <input type="checkbox"/> For the following purposes only _____	
(Transplant-therapy-research-education)	

Refusal:

4. ☐ I refuse to make any anatomical gift.

Signature

INSTRUCTIONS

See Section 2(b) (A.C.A. § 20-17-602(b)) Comments. If the applicant for a driver's license refuses to make any anatomical gift, check box 4 only.

Subsection (d) (A.C.A. § 20-17-602(d)) is Section 4(d) of the original Act.

Subsection (e) (A.C.A. § 20-17-602(e)) is a restatement of Section 4(a) of the original Act.

Subsection (f) (A.C.A. § 20-17-602(f)) is a restatement of Section 6(a) and (b) of the original Act.

Subsection (g) (A.C.A. § 20-17-602(g)) is Section 6(a) of the original Act.

Subsection (h) (A.C.A. § 20-17-602(h)) states expressly the intention of the original Act that an anatomical gift not revoked by the donor cannot be revoked after the donor's death by any other person. This was explicit in the Comments to the original Act: "Subsection (e) [of Section 2] recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others." The Hastings Center Report cited the results of a telephone survey of organ procurement agencies in the United States in 1983 as follows:

"... the survey revealed that few transplant centers were willing to procure organs solely on the basis of a donor card or driver's license consent by the deceased. In situations in which family members could not be located, less than twenty-five percent of the respondents said they would proceed with organ procurement despite the presence of a written directive."

This subsection removes any uncertainty.

Subsection (i) (A.C.A. § 20-17-602(i)) expands the original Act by providing a method of refusing to make an anatomical gift. A potential donor has several options. The donor may make an anatomical gift (Section 2(a)) (A.C.A. § 20-17-602(a)), may express or imply a contrary indication that an anatomical gift shall not be made (Section 2(j)(k)) (A.C.A. § 20-17-602(j) and (k)), or may refuse to make an anatomical gift (Section 2(i)) (A.C.A. § 20-17-602(i)). Contrary indications may include membership in organizations that do not approve of organ donation, state-

ments or actions by the potential donor that are inconsistent with organ donations, etc. To be effective as a limitation on a gift by next of kin under Section 3 (A.C.A. § 20-17-603) or on a release of a part by other persons under Section 4 (A.C.A. § 20-17-604), after death, the contrary indications must be known to the persons authorized to act under Sections 3 and 4 (A.C.A. §§ 20-17-603 and 20-17-604). The option of refusal to make an anatomical gift provided for by subsection (i) (A.C.A. § 20-17-602(i)) is a method of documenting contrary indications that might not be communicated otherwise and therefore not effective as a limitation on next of kin and other persons authorized to give or release a part under Sections 3 and 4 (A.C.A. §§ 20-17-603 and 20-17-604) of the Act. If the potential donor is unable to speak because of paralysis or other disability, any form of communicating a refusal is sufficient, e.g., responding to a direct inquiry by a nod of the head, squeeze of the hand, blink of eyes, etc.

Subsection (j) (A.C.A. § 20-17-602(j)) addresses the problem of donor cards that have been circulated by various organizations and that appear to limit the anatomical gift to only one organ, e.g., eyes, kidneys, etc. This type of card should not be construed as an expression of the intention of the donor to limit the anatomical gift to that organ only, in the absence of a refusal to give other organs or of other contrary indications.

Subsection (k) (A.C.A. § 20-17-602(k)) provides that a revocation of an anatomical gift made previously by a donor is neither a refusal to make any anatomical gift nor a contrary indication by the donor that no part shall be given or released for any purpose authorized by the Act (A.C.A. § 20-17-601 et seq.). It merely restores the donor to the status of an individual who has neither made nor refused to make an anatomical gift. In the absence of any other action or contrary indication by that individual before death, the next of kin or guardian of the person may make an anatomical gift pursuant to Section 3 (A.C.A. § 20-17-603) or the appropriate person may authorize release and removal of a part pursuant to Section 4 (A.C.A. § 20-17-604).

An amendment of an anatomical gift made previously by the donor, whether the amendment relates to a part or a purpose, is not a refusal nor a limitation on a gift or release of other parts for any purpose specified in the Act (A.C.A. § 20-17-601 et seq.). If the amendment is intended to be a refusal it must be expressed

clearly as provided in subsection (i) (A.C.A. § 20-17-602(i)).

Revocation or amendment of a previous anatomical gift is ambiguous. It does not indicate an intention of the donor to refuse to make an anatomical gift. This subsection removes that ambiguity.

Comment to § 3 (A.C.A. § 20-17-603)

Section 3 (A.C.A. § 20-17-603) combines Sections 2(b) and 4(e) of the original Act, clarifies the limited right of revocation by next of kin and provides for the effect of failure to make a gift by persons other than the donor. Subsection (a) (A.C.A. § 20-17-603(a)), as explained in Comments to the original Act:

“...spells out the right of survivors to make the gift. Taking into account the very limited time available following death for the successful removal of such critical tissues as the kidney, the liver, and the heart, it seems desirable to eliminate all possible question by specifically stating the rights of and the priorities among the survivors.”

The Act (A.C.A. § 20-17-601 et seq.) defines an anatomical gift as one “to take effect upon or after death.” Survivors may execute the necessary documents of gift even prior to death. The following form is suggested:

**Anatomical Gift by Next of Kin
or Guardian of the Person**

Pursuant to the Uniform Anatomical Gift Act, I hereby make this anatomical gift from the body of _____

_____ Name of Decedent
who died on _____ at _____ in
Date Place

City and State

The marks in the appropriate squares and the words filled into the blanks below indicate my relationship to the decedent and my wishes respecting the gift.

I survive the decedent as ☐ spouse;
☐ adult son or daughter; ☐ parent;
☐ adult brother or sister; ☐ grandparent;
☐ guardian of the person.

I hereby give (check boxes applicable):

☐ Any needed organs, tissues, or parts;

☐ The following organs, tissues, or parts only _____;

☐ For the following purposes only _____.

Date Signature of Survivor

Address of Survivor

INSTRUCTIONS

See Section 2(b) Comments.

As described in the Comments to the original Act, subsection (b):

“...provides for the effect of indicated objections by the decedent, and differences of view among the survivors. ... In view of the fact that persons under 18 years of age are excluded from [Section 2] (a), it is especially desirable to cover with care the status of survivors, so younger decedents may be included.”

“Knows” is substituted for “actual notice” in subsection (b) (A.C.A. § 20-17-603(b)) and throughout the Act (A.C.A. § 20-17-601 et seq.). Knowledge, i.e., what is known, is a more useful concept than actual notice, i.e., what should be known.

Subsection (c) (A.C.A. § 20-17-603(c)) is Section 4(e) of the original Act with the addition of “other form of communication.”

Subsection (d) (A.C.A. § 20-17-603(d)) limits the right of revocation of a gift made by other survivors pursuant to subsection (a) (A.C.A. § 20-17-603(a)). If there is no prior knowledge of the revocation by the individual removing the organ or tissue, the revocation is ineffective for any purpose and the anatomical gift may be procured and utilized as though no attempted revocation had occurred.

Subsection (e) (A.C.A. § 20-17-602(e)) is based on the concept that failure to act is

ambiguous. This subsection removes that ambiguity. If a person of a prior class under subsection (a) (A.C.A. § 20-17-603(a)) is available but does not make a gift, subsection (e) (A.C.A. § 20-17-603(e))

authorizes a gift by a person of a lower class. If an anatomical gift is not made pursuant to Section 3 (A.C.A. § 20-17-603), the provisions of Section 4 (A.C.A. § 20-17-604) apply.

Comment to § 4 (A.C.A. § 20-17-604)

Under Section 2(b) of the original Act, the last category of persons authorized to make an anatomical gift "in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class" was:

"(6) any other person authorized or under obligation to dispose of the body."

This was a residuary authorization, to apply in situations in which an individual did not "give all or any part of his body for any purpose" and the next of kin or guardian of the person did not make a gift. This residuary authorization in the original Act has been deleted in the proposed amendments and replaced by the more limited provisions of new Section 4 (A.C.A. § 20-17-604).

It is a residuary authorization for transplant or therapeutic purposes only.

The Task Force on Organ Transplantation reported that the number of potential donors annually is much smaller than the estimated one million deaths that occur each year in hospitals in the United States. The Hastings Center Report explained the uncertainty:

"There is no generally accepted figure for the number of persons who die each year in the United States under circumstances that would allow them to serve as cadaver organ donors. Studies conducted by the Centers for Disease Control of the U.S. Public Health Service suggest that at least 12,000 [based upon an age range of brain-dead donors from five to fifty-five years] and perhaps as many as 27,000 [based upon an age range of brain-dead donors from birth to age sixty-five] deaths which would permit cadaver organ recovery occur each year in hospitals in the United States. ... Given the available estimates of the size of the donor pool, the current

system for procuring organs yields somewhere between nine and twenty percent of the possible pool of donors for various types of organs and tissues."

In several states, there are statutes authorizing the medical examiner to remove eyes or corneal tissue under specified circumstances. These statutes are constitutional, *Georgia Lions Eye Bank Inc. v. Lavant*, 255 Ga. 60, 335 S.E.2d 127, 129 (1985)—"The protection of the public health is one of the duties devolving upon the State as a sovereign power;" cert. denied — U.S. —, 106 S.Ct. 1464, 89 L.Ed. 721 (1986); *Florida v. Powell*, Fla., 497 So.2d 1188 (1986). There has been a significant increase in the number of corneal tissues available for transplant as a result of these statutes. For example, before passage of the statute in Georgia in 1978 approximately 25 corneal transplants were performed each year. In 1984, more than 1,000 persons regained their sight through transplants. In Florida, the increase was from 500 to more than 3,000.

Section 4 (A.C.A. § 20-17-604) applies this statutory concept to the removal of "any part from a body" for transplant or therapy only. Specific circumstances must exist and conditions for removal are prescribed. The title of the public official is bracketed to permit each state to designate the appropriate official. There is a variation among existing statutes in the requirement to inform or seek consent of next of kin before organs or tissues are removed. In several states, including Georgia and Florida, there is no requirement to inform or seek consent if the other conditions prescribed by statute are satisfied. In others, information and consent are required. Subsection (a)(2) (A.C.A. § 20-17-604(a)(2)) seeks to balance societal and family interests, that is, to increase the size of the donor pool and to give the family the opportunity to make or refuse to make an anatomical gift. The balance in this subsection is on the side of

increasing the size of the donor pool. The duty to search the medical record or to inform next of kin is limited to "a reasonable effort taking into account the useful life of the part...." This reflects a concern expressed in the Comments to the original Act: "... the very limited time available following death for the successful recovery of such critical tissues...." The time will vary depending upon the part involved. In the case of corneal tissue, the time is within six hours after death. In the case of organs, the need, availability, and efficacy of life support systems must be consid-

ered. If removal must be immediate and there is no medical or other record and no person specified in Section 3(a) (A.C.A. § 20-17-603(a)) is present, the requirement of subsection (a)(2) (A.C.A. § 20-17-604(a)(2)) is satisfied.

Subsection (b) (A.C.A. § 20-17-604(b)) is a companion provision to subsection (a) (A.C.A. § 20-17-604(a)) to cover similar situations but in cases where the [coroner] [medical examiner] is not authorized to act. Under both subsections, the removal and release is limited to transplant or therapeutic purposes.

Comment to § 5 (A.C.A. § 20-17-605)

Each individual upon admission to a hospital is asked a series of routine questions, such as "Do you have insurance?" and "Are you allergic to any drugs?" Subsection (a) (A.C.A. § 20-17-605(a)) adds to the list a routine inquiry about organ donation. It requires that a question be asked to identify organ donors and mandates discussion about organ donation, after the consent of the attending physician, with those who answer in the negative. If there is an affirmative response, a request is made for the organ donor card, driver's license, or other document of gift to determine if there are limitations, e.g., of a particular part (eyes) or of a particular purpose (transplant only) and to place a copy in the medical record as evidence of a valid gift to be effective at death. Although the amendment is limited to the admission process of hospitals, doctors are encouraged to include a similar routine inquiry of patients in their office procedures and hospitals are encouraged to extend the routine inquiry to outpatient, emergency, minor surgery, and similar procedures that do not require admission to the hospital.

Among the major findings of the Hastings Center Report was the following:

"While many Americans believe that signing a donor card or other written directive assures that their wishes will be respected and acted upon, it does not. ... Few, if any, organs are donated solely on the basis of donor cards or written directives. Written directives are only effective if hospital protocols and practices are designed to discover and act upon the contents of such directives."

Subsection (b) (A.C.A. § 20-17-605(b)) is a variation of the required request concept. All but a few states have passed a variety of the required request statutes since 1985. Some specify that next of kin be informed of the option to give, others that a request to give be made. Federal law requires written protocols by hospitals participating in Medicare or Medicaid that "assure that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline." Subsection (b) (A.C.A. § 20-17-605(b)) requires a discussion of the option and, if there is no response, a request to make an anatomical gift. No discussion or request is necessary if the medical record discloses a prior gift or a refusal to make a gift or if the gift would not be suitable according to accepted medical standards.

The requirement is imposed on the institution. The title of the chief executive officer should be substituted for [administrator]. "Representative" is not limited to employees of the hospital. It may be a doctor, organ procurement specialist, etc.

Subsection (c) (A.C.A. § 20-17-605(c)) is based upon the Uniform Duties to Disabled Persons Act promulgated by NCCUSL in 1972. The purpose of that Act is to provide, insofar as practicable, for a minimum level of duty towards persons in an unconscious state and toward those who are conscious but otherwise unable to communicate the existence of a condition requiring special treatment.

Subsection (d) (A.C.A. § 20-17-605(d)) reflects a conclusion of The Hastings Center Report:

“Donor cards are often not found at accident sites, and even when they are, they are rarely located in hospital settings when needed.”

This subsection requires that the hospital be notified as soon as a document of gift or refusal is located and that it be sent to the hospital with the individual or the body to which it relates, not taken to the hospital at some later time. Notification of the hospital of the existence and the contents of the document will enable the hospital to notify the organ procurement organization if there is a gift, that there is a potential donor, and the limitations, if any, of the gift.

Subsection (e) (A.C.A. § 20-17-605(e)) incorporates a recommendation of The

Task Force Report pursuant to the National Organ Transplant Act of 1984 that “The Commission for Uniform State Laws develop model legislation that requires acute care hospitals to develop an affiliation with an organ procurement agency and to adopt routine inquiry policies and procedures.” The present draft incorporates this recommendation in Sections 5 and 9 (A.C.A. §§ 20-17-605 and 20-17-609).

Subsection (f) (A.C.A. § 20-17-605(f)) encourages hospital accrediting agencies, law enforcement, and other state agencies that have existing disciplinary procedures to impose sanctions for failure to discharge the duties imposed by Section 5 (A.C.A. § 20-17-605).

Comment to § 6 (A.C.A. § 20-17-606)

Subsection (a) (A.C.A. § 20-17-606(a)) is Section 3 of the original Act changed to combine subsections (1) and (3) and to reverse the sequence of purposes for which anatomical gifts may be made, i.e., transplantation followed by therapy rather than education, research, therapy, or transplantation. This emphasizes transplantation as a primary purpose.

Subsection (b) (A.C.A. § 20-17-606(b)) is a restatement of Section 4(c) of the original Act which provided that the at-

tending physician would be the donee under specified circumstances. Hospitals are substituted for the attending physician. This will facilitate coordination of procurement and utilization of the gift pursuant to Section 9 (A.C.A. § 20-17-609).

Subsection (c) (A.C.A. § 20-17-606(c)) is substantially Section 2(c) of the original Act. The last sentence has been deleted because it does not apply to donees or purposes.

Comment to § 7 (A.C.A. § 20-17-607)

Subsection (a) (A.C.A. § 20-17-607(a)) is the last sentence of Section 4(b) of the original Act.

Subsection (b) (A.C.A. § 20-17-607(b)) is Section 5 of the original Act. The Comments to that subsection include the following:

“... in the great majority of the states, no provision is made for filing, recording, or delivery to the donee. The gift is by implication effective without such formality. ... permissive filing provisions [are included] to expedite post mortem procedures.”

Comment to § 8 (A.C.A. § 20-17-608)

In subsection (a) (A.C.A. § 20-17-608(a)) the first sentence is a restatement of Section 2(e) of the original Act. The remainder of the subsection is Section 7(a) of the original Act.

The Comments to the original Act state:

“Subsection 2(e) recognizes and gives legal effect to the right of the individual to dispose of his own body without

subsequent veto by others. ... If the donee accepts the gift, absolute ownership vests in him. ... The only restrictions are that the part must be removed without mutilation and the remainder of the body vests in the next of kin.”

Subsection (b) (A.C.A. § 20-17-608(b)) is a restatement of Section 7(b) of the original Act.

The Comments to that original subsection include the following:

“... because time is short following death for a transplant to be successful, the transplant team needs to remove the critical organ as soon as possible. Hence there is a possible conflict of interest between the attending physician and the transplant team, and accordingly subsection (b)

excludes the attending physician from any part in the transplant procedures. ... However, the language of the provision does not prevent the donor's attending physician from communicating with the transplant team or other relevant donees. This communication is essential to permit the transfer of important knowledge concerning the donor”

Comment to § 9 (A.C.A. § 20-17-609)

Among the recommendations of the Task Force pursuant to the 1984 National Organ Transplant Act, was the following:

“The Joint Commission on the Accreditation of Hospitals develop a standard that requires all acute care hospitals to both have an affiliation with an organ procurement agency and have formal policies and procedures

for identifying potential organ and tissue donors and providing next of kin with appropriate opportunities for donation.”

The failure of a hospital to establish the agreements or affiliations specified in this section will not affect gifts made to the hospital or gifts by patients in the hospital.

Comment to § 10 (A.C.A. § 20-17-610)

The report of the Task Force pursuant to the 1984 National Organ Transplant Act recommended that states pass laws prohibiting “the sale of organs from cadavers or living donors within their boundaries.”

This section is not limited to donors. It applies to any person and to both purchases and sales for transplantation or therapy. It does not cover the sale by living donors if removal is intended to occur before death.

A major finding of the Hastings Center Report is:

“Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system.”

Comment to § 11 (A.C.A. § 20-17-611)

Subsection (a) (A.C.A. § 20-17-611(a)) is Section 2(d) of the original Act.

The purpose of this subsection was explained in a Comment to the original Act:

“[It] is added at the suggestion of members of the medical profession who regard a post mortem examination, to the extent necessary to ascertain freedom from disease that might cause injury to the new host for transplanted parts, as essential to good medical practice.”

Subsection (b) (A.C.A. § 20-17-611(b)) is a restatement of Section 7(d) of the original Act. The Comments to the original Act gave the reason for this subsection:

“[It] is necessary to preclude the frustration of the important medical examiners' duties in cases of death by suspected crime or violence. However, since such cases often can provide transplants of value to living persons, it may prove desirable in many if not

most states to reexamine and amend, the medical examiner statutes to authorize and direct medical examiners to expedite their autopsy procedures in cases in which the public interest will not suffer."

In 1986 the Task Force on Organ Transplantation made a similar recommendation:

"To enact laws that would encourage coroners and medical examiners to give permission for organ and tissue procurement from cadavers under their jurisdiction."

Subsection (c) (A.C.A. § 20-17-611(c)) is a restatement of Section 7(c) of the origi-

nal Act. It provided in part that "a person who acts in good faith" Concern was expressed that the term person was not sufficiently descriptive and may be construed to exclude hospitals and individuals. The present provision is more explicit. "Attempts to act in good faith" has also been added to the subsection.

Subsection (d) (A.C.A. § 20-17-611(d)) provides for limitation of liability for the benefit of the individual making a gift under the Act (A.C.A. § 20-17-601 et seq.) and that individual's estate. Some states have amended the uniform act by describing an anatomical gift as a service and not a sale or disclaiming any warranty of the part that is given. Similar provisions are found in statutes relating to blood banks.

MODEL STATE VITAL STATISTICS ACT

(§ 20-18-101 ET SEQ.)

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Preface

The Model State Vital Statistics Act is a document designed to be used by State Registrars of Vital Statistics and State Legislators when considering revision of the Vital Statistics laws. The main objectives of the 1977 Revision of the Model Act are: (1) To incorporate current social customs and practices and current technology into the policies and procedures of the vital statistics system in the various States; (2) to promote the uniformity of these policies and procedures to the end that all vital records will be readily acceptable in all places as *prima facie* evidence of the facts therein recorded; (3) to enhance the level of comparability of vital statistics data among the various States; and (4) to minimize duplication within the vital statistics system and thereby achieve maximum administrative economy.

The historical philosophy of the vital statistics systems in the United States is that vital events be registered only in the State in which they occur. This concept is maintained in this Revision of the Model Act. The jurisdiction of the State Registrar extends only to boundaries of his State and standards for registration may be set and enforced only for those events occurring within those boundaries. This is a very important concept in maintaining the validity of vital records in their use for legal purposes. If it is to be respected, the appropriate procedures for recording birth and death information for United States citizens born or dying in foreign countries and certification of birth information for aliens adopted by United States citizens must continue to be the responsibility of those Federal Agencies which retain jurisdiction over recording these events.

While this revision of the Model Act does not constitute an abrupt departure

from earlier Model Vital Statistics Acts, there are several modifications that should be noted. The most significant change relates to the establishment of a centralized system for the collection, processing, registration and certification of vital records in each State, whereby all vital events are reported directly to the State Office of Vital Statistics. However, the Model Act contains authorization for local offices to perform those functions the State Registrar may direct, including the receipt and processing of vital records and the issuance of certified copies, when such offices can be shown to be an aid to efficient and effective operation of the system. The Model Act further provides for the options of allowing such local offices to work with records only for their designated geographic area or to be given access to the entire State file and allowing them to issue certified copies without regard to where the event occurred within the State. The important concept, however, is that these offices are part of the State Office of Vital Statistics and are under the direct control of the State Registrar.

The recommendation for a change from a locally-oriented vital statistics system to a centralized system is based on several considerations: (1) A centralized system produces more timely registration of the records, thereby improving the timeliness of all operations, including publication of statistical data as well as the fulfillment of citizens' needs for vital records services; (2) it decreases duplication and cost since many activities presently performed at local vital records offices are repeated at the State Office; (3) it reduces the opportunity for fraudulent use of certified copies because amendments to the records will be easier to control and certified cop-

ies will be issued only from the original record and not from copies of the original record; and (4) due to the mobility of the population it frequently is of no benefit to maintain a file of records in the county or town of birth or death because many people do not reside in the place where they were born or where a family member dies.

This revision of the Model Act also makes a significant change in the registration of fetal deaths. Spontaneous fetal deaths of 20 completed weeks gestation or more and all induced terminations of pregnancy, irrespective of duration of gestation, will be reported as legally required statistical reports, which will not be incorporated into the official vital records file. This change recognizes the fact that spontaneous fetal death and induced abortion are not legal events in the sense that they

neither create nor change a legal status.

This revision of the Model Act also recognizes concerns about invasion of privacy, confidentiality, and fraudulent use of vital records and includes specific provision concerning these matters. In particular, the penalty provisions of the Model Act have been strengthened to serve as deterrent to illegal use of vital records and to provide adequate penalties when prosecution is necessary.

In addition to this Model Act, Model Regulations have been developed to standardize many of the administrative practices and procedures in effect in vital statistics offices. The Model Act and the Model Regulations should be considered jointly whenever vital statistics statutes are to be revised.

UNIFORM NARCOTIC DRUG ACT (AS AMENDED 1958)

(§ 20-64-201 ET SEQ.)

Commissioners' Prefatory Note

The Uniform Narcotic Drug Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1932, is an act which has received the study of the committee in charge and many experts for the past five years.

It is difficult for one not familiar with the subject to understand how many different organizations and associations have an interest in the provisions of this act. The fact was recognized in drafting that a social problem, as well as an economic question, was involved, and that the act must protect those using narcotic drugs legally, as well as provide punishment for those using such drugs illegally. Manufacturers, wholesalers, retailers, apothecaries, doctors, dentists, nurses, interns and attendants had to be protected in their legitimate use of the substances known as narcotic drugs. The idea was never absent, however, that those who were protected in the use of drugs by the act might in some cases use such drugs illegally. The committee also had to learn something of the medical effects of opium, coca leaves, cannabis and their derivatives, in order better to frame an act that would be enforceable.

Provisions in regard to addiction and search and seizure were omitted from this act, so that each state might provide its own method for the care and cure of addicts, and methods by which drugs used in illegal traffic might be forfeited. In consideration of the subject of addiction, it was evident that each state, in order to care for its addicts, must expend quite a large amount of money for hospital service. The subject of addiction and its cure, however,

is so important that no state should delay in making immediate and thorough study of this great social problem. As each state now has in its laws some provisions for search, seizure and forfeiture, it was deemed best that each state provide such methods for search, seizure and forfeiture as would best harmonize with its constitution and laws already enacted.

The committee took into consideration the fact that the federal government had already passed the Harrison Act [26 U.S.C.A. former § 2550 et seq.] and the Federal Import and Export Act [21 U.S.C.A. § 171 et seq.]. Many persons have assumed that the Harrison Act was all that was necessary. The Harrison Act, however, is a revenue producing act, and while it provides penalties for violation, it does not give the states themselves authority to exercise police power in regard to seizure of drugs used in illicit trade, or in regard to punishment of those responsible therefor. Every provision which would cause duplication of record was omitted from the act, and a section was inserted providing against double jeopardy.

Great care had to be exercised not to violate the provisions of any treaties between the United States and foreign countries in regard to traffic in narcotic drugs.

The demand for uniform state legislation on this subject was very extensive. It was argued that the traffic in narcotic drugs should have the same safeguards and the same regulation in all of the states. This act is recommended to the states for that purpose.

Supplementary Prefatory Note With Respect To Amendments Adopted in 1942

In amending the Act the Conference added Sub-paragraphs (13) and (14) of Section 1* of the Act as it appears in the enclosed pamphlet. The reason for adding

these amendments appears in the "Supplementary Comment of 1942" which appears after Section 1 (A.C.A. § 20-64-201). The Conference also amended Sub-

paragraph (2)(b) of Section 5 (A.C.A. § 20-64-205(2)(b)) and Sub-paragraph (5) of Section 5 (A.C.A. § 20-64-205(5)). The reasons for these amendments appear in the "Comment of 1942," which appears after Section 5 (A.C.A. § 20-64-205). The Conference also amended Section 8 (A.C.A. § 20-64-208) of the Act, the reasons therefor being set forth in the "Comment of 1942" which appears after Section 8 (A.C.A. § 20-64-208).

The Conference also amended Sub-paragraph (5) of Section 9 (A.C.A. § 20-64-209(5)) of the Act as originally drafted

by adding at the end of the first sentence of Sub-paragraph (5) of Section 9 the language "and the proportion of resin contained in or producible from the plant *Cannabis Sativa L.*" The reason for this amendment was to make Sub-paragraph (5) of Section 9 (A.C.A. § 20-64-209(5)) conform to Sub-paragraph (14) of Section 1*.

*The Arkansas version of this uniform act is different after the 1987 amendment by the Arkansas General Assembly.

1942 Commissioners' Comments to § 1 (A.C.A. § 20-64-201)*

When the Uniform Law was being drafted by the Conference of Commissioners on Uniform State Laws, certain optional provisions were inserted as footnotes to the regular text for consideration in the event the State Legislature wished to extend the plan of narcotic drug control to cannabis. Thus the first of these optional provisions represented a definition of cannabis as the dried flowering or fruiting tops of the pistillate (female) plant, *Cannabis Sativa L.*, etc. At that time it was assumed that the dangerous drug principle of the plant was limited to the flowering tops of the female plant. Subsequently, however, it has been definitely established that this dangerous drug principle is contained also in the leaves or foliage of both the female and male plants of cannabis. Consequently when the Federal Marihuana Tax Act of 1937 was enacted, there was contained in Section 1(b)

[26 U.S.C.A. § 3238, now § 4761] an all-inclusive definition of marihuana (*cannabis*) which in effect exempts from the operation of the law only the matured stalks of the plant, the devitalized seed and seed products. It is obvious that in order to be effective as a drug control measure, the Uniform State Narcotic Law should be made to apply to all the potentially dangerous parts of the cannabis plant, and to accomplish this purpose, the revised definition of cannabis, in conformity with the definition in the Federal Law, [26 U.S.C.A. § 3238, not § 4761] has been prepared and has been inserted in the text.

*The definition of "cannabis" was omitted from the 1987 amendment of § 20-64-201 by the Arkansas General Assembly.

1952 Commissioners' Comments to § 1 (A.C.A. § 20-64-201)

This suggested revision of Section 1(14)* of the Uniform Narcotic Drug Act would add to the definition of "narcotic drugs" covered by the act, any drugs to which the Federal laws on the subject now apply, and any drug which may be found by the State Commissioner of Health or other competent state officer to have an addiction-forming or addiction-sustaining liability.

This amendment has been proposed by the Bureau of Narcotics of the U.S. Treasury Department as a result of the discovery and development in recent years of various synthetically produced drugs

which create or sustain drug addiction. The Narcotics Bureau recommends enactment of this amendment by the several states in order that the provisions of their narcotic drug laws may cover the same drugs covered by Federal laws and also to provide a means by which additional synthetics may be added from time to time as their discovery and development may make necessary.

No states have enacted legislation exactly similar to this proposed amendment. However, the following twenty-five states and one territory have adopted amendments to their narcotic drug laws which

apply to one or more of the synthetics, indicating the growing awareness of the need for covering synthetic drugs which have been or in the future may be released commercially: Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North

Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia, Wisconsin and the Territory of Alaska.

*The Arkansas version is different from the Uniform Act.

1958 Commissioners' Comments to § 1 (A.C.A. § 20-64-201)

The first suggested revision of Section 1(14)* of the Uniform Narcotic Drug Act, as amended, would add to the definition of "narcotic drugs" covered by the Act any drugs to which the Federal Laws on the subject now apply or to which such Federal Laws might prove applicable at the time of the occurrence of any event to which this statute may be applied. In other words, such an amendment would apply to the laws of the United States presently in force and effect or such laws as the same are or may hereafter be modified or changed.

The second [alternative] suggested revision of Section 1(14)* is made in order to

avoid, if possible, constitutional questions in those states where the adoption of Federal Laws and regulations to be imposed in the future would be regarded as an unconstitutional delegation of legislative authority. If the governmental agency in charge is authorized to keep the definitions of the law in harmony with Federal enactments concerning narcotics, presumably the constitutional difficulty will be eliminated. Cf. *U.S. v. Howard*, 77 S.Ct. 303, 352 U.S. 212, 1 L.Ed.2d 261.

*The Arkansas version is different from the Uniform Act.

1942 Commissioners' Comments to § 5 (A.C.A. § 20-64-205)

Under Subsection 2(b) of Section 5 (A.C.A. § 20-64-205(2)(b)) of the Uniform Narcotic Drug Act, as originally drafted, the master of a ship, or a person in charge of any aircraft (upon which no physician is employed) may obtain narcotics for actual medical needs of persons on board such ship or aircraft when not in port, upon a special order form provided by a commissioned medical officer or acting assistant surgeon of the United States Public Health Service. The master of the ship or person in charge of aircraft cannot so obtain narcotics when a physician is employed upon the ship or aircraft. The physician can only obtain narcotics for use on board ship or aircraft in an irregular manner; that is, pursuant to an official order form issued by the collector of internal revenue under which the narcotics can be delivered only to the registered address

indicated thereon, which may be a considerable distance from the port. The proposed amendment authorizes the sale of drugs by a manufacturer or wholesaler to a physician or retired commissioned medical officer of the United States Army, Navy or Public Health Service employed upon such ship or aircraft in pursuance of a special order form which had been procured from a commissioned medical officer or acting assistant surgeon of the United States Public Health Service.

The proposed amendment of Subparagraph 5 of Section 5 (A.C.A. § 20-64-205(5)) of the Uniform Narcotic Drug Act authorizes the administering or dispensing of the narcotics obtained in pursuance of the special order form approved by the commissioned medical officer or acting assistant surgeon of the Public Health Service only on board the vessel or aircraft.

1942 Commissioners' Comments to § 8 (A.C.A. § 20-64-208)

Section 8 (A.C.A. § 20-64-208) of the Uniform Narcotic Drug Act in its original form exempts from the general requirements of that law preparations which contain certain small proportions of narcotics, putting all other preparations in the prescription class. This provision may now be deemed too liberal in view of existing world conditions. Every effort should be made to conserve the quantity of narcotics on hand for legitimate medical purposes. Persons addicted to the use of narcotics who do not have a medical need therefor had had increasing difficulty in obtaining a supply of narcotics from illicit sources. As a result they have turned to druggists and are obtaining their narcotic dosage through the purchase of narcotic preparations conditionally exempted from the operation of the Uniform Act by Section 8 (A.C.A. § 20-64-208) thereof. There has been a large increase in the number of cases reported against druggists for violation of the Federal narcotic law. The majority of these cases indicate that the druggists were selling preparations conditionally exempted from the provisions of the law to persons who do not have a medical need for the same. Many of the reports indicate that the druggists were wilfully violating the law for monetary gain only, as evi-

denced in part by the large volume sold, while in other cases the violation could be considered as resulting from negligence rather than wilfulness. For example, many addicts are obtaining large quantities of paregoric by going from one pharmacy to another and not entering one apothecary the second time until they have covered all pharmacies at which the preparation is obtainable. In this manner their names do not appear so often on the records of any one pharmacy. They often obtain paregoric on more than one occasion on the same date from the same pharmacy, usually, however, from different employees thereof, sometimes by the use of the same name, but more often by giving fictitious names.

The proposed revision should have the effect of conserving the supply of opium derivatives on hand as well as drastically reducing the possibility of sale of the narcotic-containing preparations for abusive use. It will be noted that the revision still permits the sale, without written prescription, of preparations containing not more than one grain of codeine to the ounce as this classification includes many commonly-used cough preparations concerning which there has been no evidence of abusive use.

1952 Commissioners' Comments to § 8 (A.C.A. § 20-64-208)

The Uniform Narcotic Drug Act was amended by the National Conference of Commissioners on Uniform State Laws in 1942 in such a manner as to restrict the sale of narcotic drugs, without prescription, to preparations containing not more than one grain of codeine to the ounce (Section 8) (A.C.A. § 20-64-208) since this classification includes many commonly-used cough preparations concerning which there had been no evidence of abusive use. Thus the dispensation of the more dangerous drugs such as opium, morphine, and heroin and sales of preparations such as paregoric were made subject to sale by prescription.

The Federal Bureau of Narcotics recommends that dihydrocodeinone, a comparatively new codeine derivative found useful in the treatment of cough, be added to the

exempt classification but only to the extent of 1/6-grain of dihydrocodeinone to the ounce because this drug is about six times as potent as codeine and, reputedly, more dangerous than codeine with reference to addiction liability.

No states have adopted the proposed amendment in its entirety. However, eleven states — Colorado, Iowa, Kentucky, Louisiana, Minnesota, Montana, North Dakota, Oregon, South Dakota, Vermont, Wisconsin — and Alaska have acted to limit the exemption to preparations containing not more than one grain of codeine to the ounce; and five states — Arkansas, Maryland, Nebraska, Rhode Island, and Tennessee — while not enacting the amendment have deferred to the principle by restricting the exempt classification in other ways.

1958 Commissioners' Comments to § 8 (A.C.A. § 20-64-208)

The above amendment is suggested to circumvent insofar as possible any difficulty which may arise as to changing exemptions from time to time.

1942 Commissioners' Comments to § 9 (A.C.A. § 20-64-209)

The Conference amended paragraph (5) (A.C.A. § 20-64-209(5)) by adding to the second sentence therein "and the proportion of resin contained in or producible from the plant Cannabis Sativa L." The reason for this amendment was to make said paragraph conform to paragraph (14) of section 1*.

*The Arkansas version is different from the Uniform Act.

Commissioners' Note to § 11 (A.C.A. § 20-64-211)

It is recommended by the committee that each state provide its own method of search, seizure, and forfeiture, of narcotic drugs.

TITLE 21
PUBLIC OFFICERS AND EMPLOYEES

**UNIFORM FACSIMILE SIGNATURES OF
PUBLIC OFFICIALS ACT
(§ 21-10-101 ET SEQ.)**

Prefatory Note

The National Conference of Commissioners on Uniform State Laws was requested some years ago through the Council of State Governments to draft a uniform act permitting the use of facsimile signatures by fiscal officers of the states on particularly large bond issues. At the present time, in most states, all bonds issued by states must be signed by, as a rule, the State Treasurer. This requires hours of time to sign each and every bond that will ultimately be sold by the underwriters.

The Investment Bankers Association likewise has urged the passage of acts in various states permitting the use of facsimile signatures by imprint, engraving or by some other mechanical means.

When this act came into the Conference, it was determined, as a matter of policy,

that the act should be broadened in its scope to include not only the issuance of securities, such as bonds, by the states, permitting the use of facsimile signatures, but should also be broadened to cover checks, drafts, and warrants issued by the states, as well as by all of the political subdivisions of the states, counties, school districts, cities, etc.; hence the present draft of the act is all inclusive and, if adopted, would permit the use of facsimile signatures by the various disbursing and fiscal officers of the governmental units and agencies involved. It would be a tremendous time saver in the operation of these various state offices. The act makes it a felony to copy or improperly use any facsimile signature or facility for making a facsimile signature.

Comment to Section 1(a) (A.C.A. § 21-10-101(a))*

The term "public bodies" in the bracketed portion of Section 1(a) is to permit any state that would have any body politic, public or quasi public corporation to insert the appropriate language in the definition to cover its particular situation.*

*That language is not included in the Arkansas Code.

Comment to Section 1(c) (A.C.A. § 21-10-101(c))

Refer to comment under subparagraph (a) above.

Comment to Section 4 (A.C.A. § 21-10-104)*

The penalty provisions have been left blank to be determined by each state in accordance with its penal policy.

*The Arkansas General Assembly has repealed this section.

TITLE 23

PUBLIC UTILITIES AND REGULATED INDUSTRIES

UNIFORM INSURERS LIQUIDATION ACT

(§ 23-68-101 ET SEQ.)

Prefatory Note

Depression conditions have resulted in recent years in the forced liquidation or reorganization of many insurance companies. These proceedings have brought to light certain problems peculiar to the liquidation of businesses having assets and liabilities distributed in two or more states. Insurance company assets take the form, for the most part, of special deposits required by state law, balances in the hands of insurance agents, policy premiums due but unpaid, and investments of reserve funds. The greater number of these assets naturally have their situs in the state of domicile of the company, but a substantial portion is normally scattered over the entire territory within which the company carries on its business. This is necessarily true of the special deposits required by the laws of non-domiciliary states and the balances in the hands of non-resident agents. On the other side of the balance sheet the liabilities of insurance companies, consisting primarily of policy obligations, are also distributed over the several states in which the companies do business. This wide distribution of assets and liabilities creates a formidable array of problems when liquidation, rehabilitation or reorganization proceedings become necessary for an insurer which has drifted into financial difficulties. The equitable and expeditious solution of these problems is rendered the more difficult by wide differences in the provisions of the statutes of the several states regarding such matters as special deposits, preferred claims, securities, set-off, and the administrative and judicial procedures to be followed. If statutory means can be provided which will facilitate delinquency proceedings by eradicating these difficulties they will be of great service.

Specific features of insurer delinquency proceedings causing the greatest embarrassment are the following:

1. In some states the statutes provide that the Insurance Commissioner shall serve as receiver; in others, the courts appoint receivers as their discretion dictates. In the latter states experience has shown that efficient administration is less likely to ensue.

2. Very frequently the domiciliary receivers, whether or not deemed statutory successors to the defunct companies, have but little authority in non-domiciliary states, and in some states they receive no recognition whatsoever. As a consequence, company assets located outside the home states are likely to be dissipated, and, unless ancillary proceedings are started, debtors living in such states are all too frequently able to avoid meeting their just obligations.

3. There is much confusion in the law concerning the title and right to possession of the property of a defunct non-resident insurance company. In some states the title and the right to possession are recognized as reposing in the domiciliary receiver; in others, they are in the ancillary receiver. The absence of clear definition of the law as to these matters hampers effective administration.

4. Serious inconvenience in making proof of claims is experienced by creditors who are so unfortunate as to live outside the state of the defunct insurer's domicile. It frequently happens that ancillary receivership proceedings are not commenced, or, if commenced, the property in the hands of the ancillary receiver is insufficient to meet the obligations of local creditors. As a consequence, such creditors are forced to bear the expense, annoyance, and hardship of proceeding in the

courts of the domicile of the insurance company to prove their claims. Statutory provisions which would make possible the proof of claims in the states of creditors' residence would be a great boon.

5. Another difficulty arises from the diversity of state laws concerning preferences, such as wage claims, compensation claims, tax claims and the like. Administration would be simplified and greater equity would be obtained if the laws of a single state, preferably the state of domicile of the insurance company, were made to govern all such preferences.

6. Finally, inequity often results from the fact that creditors in nondomiciliary states may, if they are sufficiently well informed and diligent, obtain preferences for themselves by commencing attachment or similar proceedings against such property as may be found in their respective states. Such proceedings can easily be commenced by properly informed creditors before ancillary proceedings are

started, and as a result other less well-informed creditors suffer accordingly. There is no just reason for permitting such preferences to prevail.

All of the foregoing difficulties may be easily eliminated if the several states will adopt a properly formulated uniform act containing appropriate reciprocal provisions. The Uniform Insurers Liquidation Act is designed to accomplish this end. The Act has been prepared by the National Conference of Commissioners on Uniform State Laws after collaboration with the Insurance Law Section of the American Bar Association, the National Association of Insurance Commissioners, the Insurance Departments of several of the states and other qualified authorities. It is believed that a general adoption of the Act will greatly facilitate proceedings commenced for the liquidation, rehabilitation or reorganization of insurance companies and will promote the equitable distribution of the assets of defunct insurers.

TITLE 25

STATE GOVERNMENT

UNIFORM LAW COMMISSIONERS' REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (§ 25-15-201 ET SEQ.)

A.C.R.C. Notes. The Arkansas version of this act does not follow the same section order as the uniform law. The comments

set out below follow the section order of the uniform law and, consequently, do not appear in A.C.A. order.

Prefatory Note

Administrative agencies have, during the last four decades, become an essential and accepted part of state governmental organization, and the procedures by which such agencies adopt their rules and reach their decisions have attained paramount importance. Due very largely to the influence of the American Bar Association, the National Conference of Commissioners on

Uniform State Laws and the state bar associations, substantial progress has been made in the direction of statutory codification of the procedures of state administrative agencies. Assurance has thereby been given of reasonable uniformity of practice and fair procedural methods for the benefit of all persons affected by state administrative action.

Preparation of the Model State Administrative Procedure Act

A brief resumé of the steps taken in the development of the Model State Administrative Procedure Act will reveal the careful attention it has received throughout the years. The act had its origin in the Section of Judicial Administration of the American Bar Association. In 1937, that Section created a Committee on Administrative Agencies and Tribunals. In 1938, at the American Bar Association meeting, the Committee presented a comprehensive report on the subject of Judicial Review of State Administrative Action in State Courts. The report was a scholarly and comprehensive document and drew much favorable comment. Again, in 1939, at the winter Section meeting, the same Committee reported — this time setting forth a draft of a proposed act dealing with certain major phases of state administrative procedure. The act was prepared to serve as a model for state legislation on the subject.

In accordance with established practice, this draft act was referred by the Section to the National Conference of Commissioners on Uniform State Laws, and at the

1939 meeting of the Conference after discussion of a measure, a Conference Committee was appointed for the purpose of further study and development of the measure.

During the year 1939-1940, the Conference Committee met with the Committee of the Section on Judicial Administration, and numerous changes in the original draft were mutually agreed upon. A revised draft was presented at the 1940 session of the National Conference, and after careful revision it was adopted and forwarded to the House of Delegates of the American Bar Association for approval. However, in January of 1941, before action was taken by the House of Delegates the United States Attorney General's Committee on Administrative Procedure filed its notable final report on the subject of federal administrative law, setting forth majority and minority drafts of bills for the regulation of federal administrative procedure. Thereafter, the Executive Committee of the National Conference decided that, in view of the Attorney General's Committee Report, it would be advis-

able to give still further consideration to the Conference measure, and accordingly it was recalled from the House of Delegates and recommitted to the Conference Committee.

Then in March of 1942, the so-called "Benjamin Report" was submitted to the Governor of New York. This report, entitled "Administrative Adjudication in the State of New York," was prepared by Robert M. Benjamin of the New York Bar as Commissioner appointed under Section 8 of the Executive Law of New York, for the purpose of studying the exercise of quasi-judicial functions of boards, commissions, and departments within the state. The report is a thorough critique of state administrative practice in New York and is at the same time a most valuable contribution to the general subject of state administrative procedure. The value of the report is by no means limited to New York State. It does for state administrative law and procedure what the Attorney General's Committee Report did for federal procedure.

With the advantage afforded by these two reports, a completely revised and much improved draft of the Model State Administrative Procedure Act was prepared and submitted for consideration at the 1942 session of the National Conference. There the act was re-examined once more and was again recommitted for final study. During the succeeding year the act was specially printed and widely submitted to members of state administrative commissions and also to bar associations, and other interested persons and groups in every state of the Union. Hundreds of helpful suggestions were received and acted upon. The then current draft of the measure was enacted almost verbatim by the state legislature of Wisconsin, where it received careful attention and much favorable comment. Again, at the 1943 session the process of careful Conference examination was repeated and the measure was set up for final action at the next session of the Conference.

In the meantime, there was additional activity in the federal field. The Special Committee on Administrative Law of the American Bar Association had prepared a draft of a proposed federal administrative procedure statute, paralleling in general nature the minority report of the Attorney General's Committee. This federal pro-

posal finally was presented to and received the approval of the House of Delegates of the American Bar Association at its meeting held in March of 1944, and it was introduced into Congress, sponsored by the Association. This measure, after being thoroughly studied by the Judiciary Committees of Congress and revised in many particulars, was finally adopted on June 11, 1946. It is known as the Federal Administrative Procedure Act.

Finally, the Model State Administrative Procedure Act, after being held in abeyance pending Congressional action on the federal measure, was approved by the National Conference of Commissioners at its October, 1946 annual meeting. For the last fifteen years it has been available as an aid to states' considering such legislation.

During the intervening years since the adoption of the original Model Act, further considered study has been given the subject of administrative procedure at both federal and state levels.

On April 29, 1953, the President of the United States, at the instance of the Chief Justice of the Supreme Court in his capacity as chairman of the Judicial Conference, called a conference concerning unnecessary delays, expense and volume of records in adjudication and rule-making proceedings in the federal agencies. Some 56 agencies were represented in this Conference. Also present were members of the Federal Judiciary, Federal trial examiners and members of the bar. The Conference formulated its recommendations and reported to the President in March, 1955.

Also on July 10, 1953, Congress, by Public Law 108, established the Commission on Organization of the Executive Branch of the Government, known as the "Second Hoover Commission." One of the Task Forces of this Commission was the Task Force on Legal Services and Procedure. It consisted of 14 members under the Chairmanship of James M. Douglas, former Chief Justice of the Supreme Court of Missouri. This Task Force undertook a major study of the procedures of federal administrative agencies. Its report included some 74 recommendations, together with proposed legislation for complete recodification of federal legal services and procedures. This report was submitted to Congress with the Hoover

Commission Report dated March 28, 1955.

Subsequently, in May of 1955, the Board of Governors of the American Bar Association established a Special Committee on Legal Services and Procedure, under the chairmanship of Ashley Sellers, Esq., a member of the Washington, D.C. Bar. This Committee, in cooperation with the Section on Administrative Law of the American Bar Association, undertook a thorough re-examination of the Federal Administrative Procedure Act in the light of the recommendations of the Hoover Commission Task Force. As a result, a new "Code of Federal Administrative Procedure" has been prepared and introduced into Congress. It was known as S-1070 of the 86th Congress. Many of the changes herein recommended in the revision of the Model State Administrative Procedure Act herewith presented are derived from S-1070.

At the same time, all through the years, there has been a substantial amount of activity at the state level. In recent years in the following states statutes have been enacted based in whole or in part on the Model State Administrative Procedure Act:

(1) North Dakota — Uniform Practice Act. Adopted in 1941, this act was the first of the general remedial acts. It specified basic procedures, both for rule-making and for adjudication. See North Dakota Laws, 1941, ch. 240; Rev. Code 1943, §§ 28-3201 to 28-3222. See also Hoyt, "North Dakota Leads in Administrative Law Field," 25 J. Am. Jud. Soc. 114 (1941).

(2) Wisconsin — Uniform Administrative Procedure Act. Adopted in 1943, this act, as has been stated, was modeled closely on the tentative draft of the Model Act being prepared by the National Conference of Commissioners on Uniform State Laws. In the Wisconsin legislature it was acclaimed as an important and significant procedural reform. See Wisconsin Laws of 1943, ch. 375. For a careful discussion of the measure, see Hoyt, "Wisconsin's Administrative Procedure Act," Wis. L. Rev. (1944), pp. 214-239.

(3) North Carolina — Revocation of License Act. Adopted in 1939, and extensively amended in 1953, this act prohibits the cancellation of certain speci-

fied types of licenses without prior notice and hearing, and provides for appeal from cancellation orders to the superior courts. See North Carolina General Statutes, §§ 150-1 to 150-34.

(4) Ohio — Uniform Administrative Procedure Act. Also adopted in 1943 on recommendation of a special administrative law commission created by the preceding legislature. The act prescribes procedure for licensing agencies — licensing being broadly defined to include all orders determining "the rights, duties, privileges, benefits, or legal relationships of a specified person or persons." See Ohio General Code (1943), §§ 154-161 to 154-173. For a description of the work of the Ohio Administrative Commission that drafted the bill, see 15 Ohio State Bar Association Reports 581 (1943).

(5) Virginia — Administrative Agency Act. This act, adopted in 1944, contains a general and comprehensive treatment of the entire administrative process. See ch. 160, Acts of 1944, as amended by ch. 234, Acts of 1946.

(6) California — Administrative Procedure Act, Gov. Code, Title 2, Div. 3, Part 1, chaps. 4 and 5, effective September 9, 1953. Previously, three separate acts relating to the principal aspects of procedure and review had been adopted in 1945, the result of two years of careful and thorough study by the California Judicial Council. The Council took advantage of previous studies and legislation, with the result that the provisions are exceedingly well-considered and effectively drafted. See the Administrative Procedure Act, Stats. 1945, ch. 867; Government Code, Titl. 2, Div. 3, Pt. 1. The Division of Administrative Procedure Act, Stats. 1945, ch. 869; Business and Professions Code, Secs. 110.5, 110.6; and the Judicial Review Procedure Act, Stats. 1945, ch. 868; Code Civil Procedure, § 1094.5.

(7) Illinois — Administrative Review Act. This act was adopted in 1945 and is limited to provisions concerning judicial review of administrative action. See Laws of Illinois (1945), p. 1144.

(8) Pennsylvania — Administrative Agency Law. This act, adopted in 1945 and amended in 1951, is a comprehensive act, including provisions for filing and publication of administrative rules

as well as provisions concerning adjudication procedure and judicial review. See 71 Purdon Penn. Stat. Sec. 1710.1.

(9) Missouri — Administrative Procedure and Review Act. In 1945, Missouri enacted a comprehensive act, following the adoption of constitutional amendments designed to place suitable curbs and limits on administrative discretion. An interesting and highly informative account of the Missouri experience, by Richard D. Shewmaker of the St. Louis Bar, is printed with the provisions of the statute, 37 Vernon's Annotated Missouri Statutes, ch. 536, p. 145.

(10) Indiana — Administrative Adjudication Act. Indiana (which had previously adopted certain provisions applicable to administrative rulemaking) in 1947 enacted provisions regulating adjudicatory procedures of the agencies, and providing for judicial review. Burns Indiana Statutes, ch. 30, Sec. 63.3001.

(11) Michigan — Administrative Procedure Act. Michigan in 1952 adopted a

statute which follows closely the provisions of the Model State Act and imposes considerably more rigorous provisions as to the publication of administrative rules. Mich. Stat. Ann. §§ 3.560 (21.1-21.10).

(12) Massachusetts — Fair Administrative Procedure Act. An excellently drafted, comprehensive and far-reaching statute was adopted by Massachusetts in 1954. Mass. Acts, 1954, ch. 681.

All of the foregoing activities have resulted in a very substantial maturing of ideas with respect to administrative procedures which must be fair to the parties and at the same time effective from the standpoint of government. This ripening of thought has induced the National Conference of Commissioners on Uniform State Laws to undertake a revision of the 1946 edition of its Model Act. In 1958, a special committee was appointed for the purpose. The present revision is the result of committee studies and Conference action.

Content of the Model State Administrative Procedure Act

A brief explanation of the content of the Model Act and the principles involved in it will be helpful. The act deals primarily with major principles, not with minor matters of detail. Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.

The major principles embraced in the Act as adopted by the Conference are:

(1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule-making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information;

(2) Assurance of proper publicity for all administrative rules;

(3) Provision for advance determination of the validity of administrative rules, and for "declaratory rulings," affording advance determination of the applicability of administrative rules to particular cases;

(4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;

(5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;

(6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.

There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details, they are essential safeguards of fairness in the administrative process. Yet too many state statutes are altogether deficient in regard to them.

Recent years have, however, been bringing forth in many quarters profound apprehension over the undisciplined growth of administrative powers, and this is the reason why the Congress and several state legislatures have been sufficiently concerned to take affirmative action.

The Model State Administrative Procedure Act is offered by the National Conference of Commissioners in the hope that

it will serve a good purpose in states that may be considering the adoption of such legislation or the revision of acts already on the statute books. The Model Act will, of course, require careful adjustment to the special statutory conditions peculiar to the state under consideration but the general principles set forth are of universal applicability and the suggested language will also be found helpful.

Comment to Section 1(1) (A.C.A. § 25-15-202(1))

The several sections of the Revised Model Act are annotated with appropriate comments and also by setting forth the corresponding or related provisions of the Federal Administrative Procedure Act, thus affording opportunity for comparison with the measure designed to cover the much larger and more complex federal agencies.

The following are the provisions of the Federal Administrative Procedure Act corresponding to Section 1(1) (A.C.A. § 25-15-202(1)) of the Revised Model Act:

"Sec. 2(a) Agency. — 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of organizations of the parties to the disputes determined by them, (2) courts-martial and military commissions,

(3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.)

It will be noted that the term "agency" in the Model Act is made all inclusive. It is desirable that it be so, although it is not always possible to get it through the legislature in that form. In Michigan, for example, the Workmen's Compensation Commission, the Employment Security Commission, the Department of Revenue, and the Security Commission have been expressly excluded from the term "agency."

It may also be desirable, at least in certain states, to add some of the city or county agencies. Where they have substantial powers over persons and property it is proper to expect them to be governed by the same procedural standards as those prescribed for statewide agencies.

Comment to Section 1(2)*

The correspondent section of the Federal Administrative Procedure Act reads as follows:

"Sec. 2(d) Order and Adjudication. — 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

The term "contested case" is used in the Model Act, instead of the word "adjudica-

tion" as found in the Federal Act, to avoid the possible confusion in terminology that might result from the fact that ratemaking under the Federal Act is classified as "rule making" with special procedures applicable to it, whereas under the Model Act it is desired to apply the contested case procedures to ratemaking.

"Price fixing" is bracketed for two reasons, first, certain states do not have price fixing laws and hence will not wish to include the reference, and, second, some states that have price fixing on their stat-

ute books may prefer to utilize less formal procedures than those set up for contested cases under the Model Act.

*The Arkansas version is different from the Model Act.

Comment to Section 1(7) (A.C.A. § 25-15-202(4))

The corresponding section of the Federal Administrative Procedure Act reads as follows:

"Sec. 2(c). Rule and Rule Making. — 'Rule' means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency, and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or

practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule."

The phrase "or particular applicability" in the federal act is omitted from the Model Act, thus limiting its scope but clarifying its meaning. Attention should be called to the fact that rules, like statutory provisions, may be of "general applicability" even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions.

Comment to Section 2 (A.C.A. § 25-15-203)

This section goes far beyond the provisions of Section 2 of the original Model State Administrative Procedure Act. Public information is substantially increased in scope. Subsection (a)(1) (A.C.A. § 25-15-203(a)(1)) is made mandatory, whereas under the original act the obligation to promulgate descriptions of organization and the general course of operations was required only "so far as practicable." Also included are recommendations of the Hoover Commission Task Force to the effect that statements of policy and interpretive materials, as well as rules, orders, and opinions shall be made available for public inspection. Finally, the sanctions of Subsection (b) (A.C.A. § 25-15-203(b)) are included for the first time.

The corresponding provisions of the Federal Administrative Procedure Act are as follows:

"Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency —

"(a) Rules. — Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which,

and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) Opinions and Orders. — Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(c) Public records. — Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

Comment to Section 3 (A.C.A. § 25-15-204(a)-(c))

This section corresponds to, but is a substantial enlargement of the requirements of Section 2(3) of the original Model State Administrative Procedure Act. It prescribes the specific method of giving advance notice of intended rule making. Also it insures, so far as feasible, that all interested persons will have an opportunity to present their views, and it adopts a Hoover Commission Task Force recommendation intended to give some degree of assurance that the agency will, in fact, consider the arguments advanced by the affected parties. Finally in subsection (c)* it includes a sanction of considerable force.

The corresponding provisions of the Federal Administrative Procedure Act are as follows:

"Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts —

"(a) Notice. — General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpreta-

tive rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) Procedures. — After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

It should be noted that the Revised Model Act goes beyond the Federal Act by requiring notice prior to the promulgation of "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice." This accords with the Hoover Commission Task Force recommendations and seems wholly desirable although it may involve a certain amount of administrative inconvenience in application in certain agencies.

*The Arkansas version is substantially different from the Model Act.

Comment to Section 4 (A.C.A. § 25-15-204(d)-(f))

This section differs from the corresponding section of the original Model State Administrative Procedure Act by making the rule effectual 20 days after filing instead of on the filing date. This is a more realistic arrangement.

The corresponding provisions of the Federal Administrative Procedure Act read as follows:

"Sec. 4(c). Effective Dates. — The re-

quired publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

Comment to Section 5 (A.C.A. § 25-15-205)

Basic principles of fairness require that before individuals are required to comply with administrative rules, a reasonable attempt should be made to give notice and opportunity to become familiar with their contents. Sections 3 (A.C.A. § 25-15-204(a)-(c)) and 5 (A.C.A. § 25-15-205) should accomplish the desired result. Similar considerations gave rise to the Federal Register Act adopted by Congress in 1935. That act provides for the filing with and the serial publication of administrative rules by a division of the National Archives Establishment. *Federal Register*

Act, 44 U.S.C.A., Secs. 302 and 303. Section 307 of that act provides that no rule shall be valid as against any person who has not had actual knowledge thereof until it has been filed and made available for public inspection. In view of the fact that the Federal Register Act already covers the subject of publication of Federal administrative rules, no provision corresponding to Section 5 (A.C.A. § 25-15-205) of the Model State Act is to be found in the Federal Administrative Procedure Act.

Comment to Section 6*

The original Model Act contained the substance of the first two sentences, but the third sentence has been added, in conformity with recommendations of the Hoover Commission Task Force, to bring pressure to bear on the agency to induce action on petitions.

The corresponding provision of the Federal Administrative Procedure Act reads as follows:

"Sec. 4(d) Petitions. — Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

* Arkansas did not adopt Section 6 of the Model Act.

Comment to Section 7 (A.C.A. § 25-15-207)

It should be noted that in Section 3 (A.C.A. § 25-15-204(a)-(c)) setting up the procedure for the adoption of rules, it is provided in subsection (c)* that failure to comply substantially with the prescribed procedures shall be ground for invalidating the rule. However, actions on this ground must be brought within two years, whereas no such time limitation is included in Section 7 (A.C.A. § 25-15-207).

Under the Federal Administrative Procedure Act rule making is reviewable under the provisions of the section dealing

with judicial review of administrative orders. Hence, there is no section in that act similar to Section 7 (A.C.A. § 25-15-207).

The Uniform Declaratory Judgments Act does not reach invalid administrative rules and, therefore, there is no possibility of conflict with that act or with state acts conforming thereto.

*The Arkansas version is different from the Model Act.

Comment to Section 8 (A.C.A. § 25-15-206)

The following is the corresponding provision of the Federal Administrative Procedure Act:

"Sec. 5(d). *Declaratory Orders*. — The agency is authorized in its sound discre-

tion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

Comment to Section 9 (A.C.A. § 25-15-208)

This section enlarges considerably upon the corresponding provisions of the original Model Act. The contents of the notice are spelled out in greater detail, as are the contents of the record. Of especial significance is the provision that includes in the record "all staff memoranda submitted to the hearing officer or members of the agency in connection with their consideration of the case." In some circumstances it may prove desirable to go even further and prescribe that such staff memoranda shall be submitted for the record in time to permit adverse parties to offer evidence in reply. This careful specification of the content of the record is in accordance with the recommendations of the Hoover Commission Task Force report.

The corresponding provisions of the Federal Administrative Procedure Act are:

"Sec. 4. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions

rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives —

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearing, due regard shall be had for the convenience and necessity of the parties or their representatives.

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

Comment to Section 10*

In this section, two substantial changes from the original Model Act are included: (1) Agencies are required (not merely permitted) to exclude irrelevant, immaterial and unduly repetitious evidence; (2) agencies are required to follow the rules of evidence applied in [non-jury] civil cases in the state courts (subject to the "escape clause" in cases of hardship). Accordingly the standards of proof in administrative adjudication are equated in reasonable degree and so far as possible with those applicable in the courts, thus leading to uniform treatment of evidence in all types of adjudication within the state. The phrase "non-jury" is bracketed because in some states it is difficult to differentiate between the rules followed in jury and non-jury cases.

It is difficult to provide any single standard of evidence which is suitable for all

agencies, in all circumstances. A review of State legislation in this area reveals wide departures from the standards of the present Model Act. The departures are in all directions — some, in the direction of permitting the agencies to receive any testimonial offer; others, in the direction of limiting them to common law rules of evidence. The proposed language represents a compromise that owes much to the suggestions of the Hoover Commission Task Force and to provisions in the California, Michigan, North Dakota, Virginia, and Wisconsin statutes.

In addition to these two changes which are of substantial importance, several minor refinements in the provisions of the original Model Act are included.

Provision is made in subsection (2) for use of copies of documentary evidence. This subsection is bracketed to indicate

that it is intended for states where the rules of evidence applied in court proceedings impose stricter limits on the use of copies of documentary evidence.

Again the right of cross-examination is made more explicit than in the original Model Act by the use of language similar to that found in the Federal Administrative Procedure Act.

The following are the corresponding provisions of the Federal Act:

"Sec. 7(c). *Evidence*. — Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence,

to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule-making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"Sec. 7(c). *Record*. — The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

* Arkansas did not adopt Section 10 of the Model Act.

Comment to Section 11 (A.C.A. § 25-15-210(a))

The purpose of this section is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude "signing on the dotted line."

The corresponding provisions of the Federal Administrative Act are:

"Sec. 8(a). *Action by Subordinates*. — In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or

review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses, (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

Comment to Section 12 (A.C.A. § 25-15-210(b))

An attempt is here made to require agency findings to go beyond a mere statement of a general conclusion in the statutory language (e.g., that "public interest, convenience and necessity" will be served) or in language of similar generality. The intent is to require the degree of explicitness imposed by such decisions as *Saginaw Broadcasting v. Federal Communications Commission* (Ct. App. D.C., 1938), 96 Fed. 2d 554, where the court required a statement of the "basic or underlying facts." Several states have concerned themselves with this problem. Missouri has adopted the requirement that findings of fact and conclusions of law shall be "separated." North Dakota and Virginia require that findings shall be "explicit." The desire is to find the proper middle course between a detailed reciting of the evidence on the one hand and the bare statement of the conclusions of fact or the "ultimate" facts on the other. The phrase "underlying facts supporting the finding" seems about right.

The following are the provisions of the Federal Administrative Procedure Act:

Comment to Section 13 (A.C.A. § 25-15-209)

This section is intended to preclude litigious facts reaching the deciding minds without getting into the record. Also precluded is *ex parte* discussion of the law with the party or his representative. No objection is interposed to discussion of the law with other persons, e.g., the attorney general, or an outside expert.

The following are somewhat related provisions of the Federal Administrative Procedure Act:

"Sec. 5(c). Separation of Functions. — The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and

"Sec. 8(b). Submittals and Decisions. — Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining the applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

Comment to Section 14 (A.C.A. § 25-15-211)

In this revision of the Model State Administrative Procedure Act licensing has been specifically included among “contested cases” (see Section 1(2)* and (3)*, and in view of the widespread importance of the subject in state affairs, it would seem desirable to take notice of certain other facets of the matter. Hence this section is included. There is a corresponding provision in the Federal Administrative Procedure Act reading as follows:

“Sec. 9(b). In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or

safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.”

*The Arkansas version is different from the Model Act.

Comment to Section 15 (A.C.A. § 25-15-212)

An important question that arises under subsection (a)* is whether or not the review provisions should be made exclusive and all other review provisions on the statute books should be repealed. Each state will have to deal with this matter as the local circumstances dictate. On the one hand, if there is but one mode and scope of review, the state procedural structure is greatly simplified. On the other hand, local considerations, including practical considerations connected with obtaining adoption of the Model Act, may indicate or even require the retention, at least for the moment, of the pre-existing methods of judicial review.

Two important changes are made in subsection (g)* from the corresponding provisions in the original Model Act.

First, the “substantial evidence rule” has been replaced by the “clearly erroneous rule,” thus following the recommendation of the Hoover Commission Task Force and the American Bar Association Special Committee on Legal Services and Procedure. This change places court review of administrative decision on fact questions under the same principle as that applied under the Federal Rules of Civil Proce-

cedure in connection with review of trial court decision. See Rule 52(a). Also see *United States v. U.S. Gypsum Company* (1948), 333 U.S. 364, 68 Sup. Ct. 525, and Barron and Holtzoff, *Federal Practice and Procedure*, Par. 1133. This standard of review does not permit the court to “weigh” the evidence, or to substitute its judgment on discretionary matters, but it does permit setting aside “clearly” erroneous decisions. Certainly a clearly erroneous decision should not be permitted to stand.

Second, it should be noted that “clearly unwarranted exercise of discretion” has been specifically equated to “arbitrary action” — as it should be. A clearly unwarranted exercise of discretion should be set aside.

The following are the corresponding provisions of the Federal Administrative Procedure Act:

“Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —

“(a) Right of Review. — Any person suffering legal wrong because of any agency action, or adversely affected or

aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

“(b) Form and Venue of Action. — The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

“(c) Reviewable Acts. — Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

“(d) Interim Relief. — Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent

irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

“(e) Scope of Review. — So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.”

*The Arkansas version is substantially different from the Model Act.

Comment to Section 18*

The preparation of this section will require careful and detailed work in each state. General repealers will ordinarily not suffice, and hence attention must be paid to each agency enabling act and the changes necessary therein.

*The repealer is not codified for the Arkansas version of the Model Act.

TITLE 26

TAXATION

UNIFORM DIVISION OF INCOME FOR TAX PURPOSES

(§ 26-51-701 ET SEQ.)

Prefatory Note

The Uniform Division of Income for Tax Purposes Act is designed for enactment in those states which levy taxes on or measured by net income.

The need for a uniform method of division of income for tax purposes among the several taxing jurisdictions has been recognized for many years and has long been recommended by the Council of State Governments. There is no other practical means of assuring that a taxpayer is not taxed on more than its net income. At present there are various formulae for determining the amount of income to be taxed in use by the states, and the differences in the formulae produce inequitable results. Many states now use the three

factor formulae of this Act. The problem has been well analyzed and its historical background outlined in an article appearing in 18 Ohio State Law Journal page 84.

The Uniform Division of Income for Tax Purposes Act is the result of conferences with the representatives of the Controller's Institute of America, the Council of State Governments and various interested individuals. It was promulgated in 1957. The comments in the present reprinting of the Act were revised and extended in February 1966 in order to clarify the solutions to some of the problems which have been experienced in securing enactment of the Act in the several states. March 1, 1966

Comment to Section 1(a) (A.C.A. § 26-51-701(a))

This definition refers to "the" taxpayer's trade or business as if he had one business. It is not intended by this language to require a taxpayer having several "businesses" to use the same allocation and apportionment methods for the businesses. The language permits separate

treatment of different businesses of a single taxpayer. Section 18 (A.C.A. § 26-51-718) clearly permits separate treatment.

Income from the disposition of property used in a trade or business of the taxpayer is includible within the meaning of business income.

Comment to Section 1(b) (A.C.A. § 26-51-701(b))

The phrase "directed or managed" is not intended to permit both the state where the board of directors meets and the state where the company is managed to claim

the commercial domicile. The phrase "directed or managed" is intended as two words serving the same end; not as two separate concepts.

Comment to Section 1(c) (A.C.A. § 26-51-701(c))

This definition is derived from the Model Unemployment Compensation Act which has been adopted in all states.

Compensation paid to "employees" becomes important in the payroll fraction in section 13 (A.C.A. § 26-51-713). If a corporation is employed to provide personal

services, section 18 (A.C.A. § 26-51-718) may be used to include compensation paid to corporations in the fraction if exclusion of compensation paid to corporate agents fails to reflect adequately the business activity within the state.

Comment to Section 1(d) (A.C.A. § 26-51-701(d))

This definition and the definition of “public utility” in subsection (f) is necessary because section 2 (A.C.A. § 26-51-702) excludes from allocation and apportionment under this Act, income from these two types of business activity. The exclusion is proposed because some states

have separate legislation for apportionment and allocation of income of such taxpayers. If not, and the state proposes to change subsection (2) so as to apply the Act to such taxpayers, this would not necessarily detract from the uniformity objective of this Act.

Comment to Section 1(f) (A.C.A. § 26-51-701(f))

It is expected that “public utility” will be defined to include all taxpayers subject to the control of the state’s regulatory bodies on the theory that separate legislation will provide for the apportionment and allocation of the income of such taxpayers.

See Comment to the definition of “financial organization” for purpose of this definition. “Oil, oil products or gas” is not

intended to be so restrictive as to treat differently a public utility, if any, which transmits or produces “gas products.” The essential point of the definition is the requirement that the business excluded by this definition and subsection 2 be a “public utility.” Private transmission lines and private production or storage companies are thus not excluded.

Comment to Section 1(g) (A.C.A. § 26-51-701(g))

This all inclusive definition of sales is intended to make apportionable all income not allocated under sections 4 (A.C.A. § 26-51-704) through 8 (A.C.A. § 26-51-708). As indicated in the Com-

ment to subsection 1(a) (A.C.A. § 26-51-701(a)) income from sales or property used in trade or business is included in apportionable income.

Comment to Section 3 (A.C.A. § 26-51-703)

This section defines, for purposes of section 2 (A.C.A. § 26-51-702), where a taxpayer is “taxable both within and without this state.” To bring this Act into operation a taxpayer must have income from business activity, and he must be taxable in this state, and also in some other state.

Two tests are used by this section to determine when a taxpayer is “taxable in another state.” The first test is a fairly obvious one, the taxpayer is taxable in another state if he is actually subjected to the type of taxes listed in subparagraph (1).

The second test, in subparagraph (2) uses a “notional” or “hypothetical” standard rather than an actual one. Thus, if a corporation has its commercial domicile in state X, which has only a sales tax and no tax measured by net income, but that corporation has business activity in state A, which has this apportionment Act, state A must apportion the business income as provided in this Act so that some

of it is allocated to state X, even though as a result of the tax system of state X a portion of the business income escapes income taxation. This is desirable in order to treat the business of all states equally, and in order to avoid having this Act as a factor in inducing a state to have an income tax. If it does not wish to tax income, that is no reason for a state which does wish to tax income to attempt to obtain more than its share of taxable income.

It should be noted that in subsection 1(h) (A.C.A. § 26-51-701(h)) the word “state” is defined broadly enough to include a foreign country. This means that “taxable in another state” within section 3 (A.C.A. § 26-51-703) may mean a foreign country. The apportioning state, however, need consider only whether the foreign country “could have” taxed the income under the constitution of the United States if it had been a state.

While subparagraph (1) lists several types of taxes which might be actually in

effect in another state, the reference in subparagraph (2) only to a "net income" tax is not intended to be more restricted in

the hypothetical tax than the section is with respect to an actual tax.

Comment to Section 4 (A.C.A. § 26-51-704)

This section is the general section on "allocating" non-business income to a state just as section 9 (A.C.A. § 26-51-709) is the general section on apportionment of business income. Section 2 (A.C.A. § 26-51-702) refers to an allocation and an apportionment of "net income." In "allocating" nonbusiness income to a state, the states concerned with this allocation

may desire to allocate the expenses properly attributable to nonbusiness but allocable income in the same way that income is allocated so that these expenses will not be involved in determining net income from business activity where apportionment is used. Section 18 (A.C.A. § 26-51-718) of this Code empowers the state to make this adjustment if it wishes.

Comment to Section 5 (A.C.A. § 26-51-705)

Rents from mobile tangible property are to be allocated in accordance with section 5(c) (A.C.A. § 26-51-705(c)). This subsection apportions the rents by a fraction based on the number of days in the state on the assumption that the rents are generally based on time of use. If the rent itself is calculated on the basis of some factor other than time, section 18 (A.C.A.

§ 26-51-718) would permit a state to substitute a fraction based on this substitute factor. Thus, if the rent for a drilling rig is calculated on the basis of number of feet drilled, the "extent of utilization" in the state might also be determined on the basis of a fraction which uses "feet drilled" rather than days in the state.

Comment to Section 10 (A.C.A. § 26-51-710)

The property to be included in the numerator and denominator is property producing the net income to be apportioned. If net income from property is allocated

property under sections 5 (A.C.A. § 26-51-705) through 8 (A.C.A. § 26-51-708) such property should be excluded in constructing the fraction.

Comment to Section 11 (A.C.A. § 26-51-711)

This section is admittedly arbitrary in using original cost rather than depreciated cost, and in valuing rented property as eight times the annual rental. This approach is justified because the act does not impose a tax, nor prescribe the depreciation allowable in computing the tax, but merely provides a basis for division of the taxable income among the several states. The use of the original cost obviates any differences due to varying methods of depreciation, and has the advantage that the basic figure is readily ascertainable from the taxpayer's books. No method of valuing the property would probably be universally acceptable.

In any situation where it is impossible

to ascertain original cost, section 18 (A.C.A. § 26-51-718) may be used to determine a fair value for such property. Section 18 (A.C.A. § 26-51-718) may also be necessary to aid in determining "net annual rental value" of tangible personal property where the actual rent is so related to services that the part attributable to the object is difficult to determine.

Section 18 (A.C.A. § 26-51-718) may also be used to determine a reasonable rental rate for this fraction where the actual rent is zero or nominal such as may be the case where a local government in attempting to induce an industry to come to a community supplies the property at a nominal rental.

Comment to Section 13 (A.C.A. § 26-51-713)

Payroll attributable to management or maintenance or otherwise allocable to nonbusiness property should be excluded from the fraction.

Payroll "paid" should be determined by

the normal accounting methods of the business so that if the taxpayer "accrues" such matters the payroll should be treated as "paid" for the purpose of this section.

Comment to Section 14 (A.C.A. § 26-51-714)

This section is derived from the Model Unemployment Compensation Act. This is the same figure which will be used by

taxpayers for unemployment compensation purposes.

Comment to Section 15 (A.C.A. § 26-51-715)

The sales to be included in the fraction are only the sales which produce business income. Sales which produce "capital gains" are under section 6 (A.C.A. § 26-

51-706) and are to be allocated rather than apportioned.

"Total sales" means "total net sales" after discounts and returns.

Comment to Section 16 (A.C.A. § 26-51-716)

The phrase "delivered or shipped to a purchaser" in this state includes shipments, at the designation of the purchaser, to a person in this state such as designating, while a shipment is en route, the ultimate recipient.

Sales to the United States are treated separately. It is thought that this is justified because sales to the United States are not necessarily attributable to a *market* existing in the state to which the goods are originally shipped. This different treatment may also be justified because, if the goods are defense or war

materials, it may be impossible to determine whether the goods ever come to rest in the state due to use of coded delivery instructions.

The section does not specify how sales from a subsidiary in the state to an out-of-state parent, such as a marketing corporation who thereupon redirects the goods back into the state, should be treated. If returns are not consolidated under existing state tax law, it may be necessary to use section 18 (A.C.A. § 26-51-718) to make a fair representation of the business income in this situation.

Comment to Section 18 (A.C.A. § 26-51-718)

It is anticipated that this Act will be made a part of the income tax acts of the several states. For that reason, this section does not spell out the procedure to be followed in the event of a disagreement between the taxpayer and the tax administrator. The income tax acts of each state presumably outline the procedure to be followed.

Section 18 (A.C.A. § 26-51-718) is intended as a broad authority, within the principle of apportioning business income fairly among the states which have contact with the income, to the tax administrator to vary the apportionment formula

and to vary the system of allocation where the provisions of the Act do not fairly represent the extent of the taxpayer's business activity in the state. The phrases in section 18(d) (A.C.A. § 26-51-718(d)) do not foreclose the use of one method for some business activity and a different method for a different business activity. Neither does the phrase "method" limit the administrator to substituting factors in the formula. The phrase means any other method of fairly representing the extent of the taxpayer's business activity in the state.

TITLE 27

TRANSPORTATION

UNIFORM VEHICLE CODE (§ 27-49-101 ET SEQ.)

This act has been substantially modified, amended, and repealed by the Arkansas General Assembly so that it is questionable whether it is still uniform.* For the commentary to this act, see Uniform Vehicle Code: Rules of the Road with Statutory Annotations.

*The Arkansas version of this act is codified throughout subtitle 4 of Title 27.

TITLE 28

WILLS, ESTATES, AND FIDUCIARY RELATIONSHIPS

PROBATE CODE OF 1949 (§ 28-1-101 ET SEQ.)

A.C.R.C. Notes. These commentaries follow the section order of the Probate Code as it appeared in the Arkansas Stat-

utes of 1947 Annotated (A.S.A.) rather than the section order of the Arkansas Code of 1987 Annotated.

Committee Comment to A.S.A. § 60-401 (A.C.A. § 28-25-101)

Sections 14510-11, Pope's Digest, provide that every person of the age of twenty-one years and of sound mind may execute a will for all purposes and that every person at the age of eighteen years and of sound mind may dispose of personalty by will.

The committee feels that no distinction should be made between the right to dispose of personalty and the right to dispose of realty, and that the general intelligence and business judgment of minors has been raised substantially since the adoption of the Revised Statutes, now in force.

Committee Comment to A.S.A. § 60-402 (A.C.A. § 28-25-102)

This section is a restatement of the existing law as to interested witnesses.

Subsection a is new, the old law being covered in Section 14510-11, Pope's Digest.

Subsection d. Section 14547, Pope's Digest, requires that an interested witness may be compelled to testify respecting the execution of the will.

The Supreme Court of Arkansas has held that one who is an executor under a will is not an "interested" witness to the execution of the will: *Fontaine v. Fontaine* (1925), 169 Ark. 1077, 277 S. W. 867; Section 14553, Pope's Digest [§ 60-112 — repealed].

Committee Comment to A.S.A. § 60-403 (A.C.A. § 28-25-103)

Subsection a (3). This follows closely Section 13258, Pope's Digest, with reference to signing by mark.

Subsection a (4) follows Section 14513, Pope's Digest.

Committee Comment to A.S.A. § 60-404 (A.C.A. § 28-25-104)

This section is similar to Section 14512, paragraph Fifth, Pope's Digest, omitting the limitation that a holographic will can

not supersede an existing will executed according to the statute.

Committee Comment to A.S.A. § 60-405 (A.C.A. § 28-25-105)

This is covered by Section 14557, Pope's Digest, with an added provision that a will is valid as executed according to the law of

the testator's domicile even if executed elsewhere.

Committee Comment to A.S.A. § 60-406 (A.C.A. § 28-25-109(a) and (c))

Section 14519, Pope's Digest, contains essentially the same provisions as the foregoing.

Committee Comment to A.S.A. § 60-407 (A.C.A. § 28-25-109(b))

This section repeals Section 14521, Pope's Digest, which provides that marriage of a woman revokes a will previously executed by her.

The husband's right of curtesy where

there is outstanding at the time of his wife's death a will made by her prior to marriage has been covered in Section 33 [§ 60-501 (A.C.A. § 28-39-401)].

Committee Comment to A.S.A. § 60-408 (A.C.A. § 28-25-110)

Section 14528, Pope's Digest, touches this subject, but the Committee feels the foregoing is more clearly stated.

Committee Comment to A.S.A. § 60-409 (A.C.A. § 28-26-102)

This is already the law in Arkansas by decision. *Patty v. Goolsby* (1888), 51 Ark. 61, 9 S.W. 846. It is inserted in the 1949

Probate Code merely for the purpose of clarification and indicating that no change in the case law is intended.

Committee Comment to A.S.A. § 60-410 (A.C.A. § 28-26-104)

This follows Section 14527 of Pope's Digest with the addition of the reference to devisees to members of a class and with

further change that wherever used in this section the term "child" includes a child by adoption.

Committee Comment to A.S.A. § 60-411 (A.C.A. § 28-26-103)

This is merely a declaration of the present case law.

Committee Comment to A.S.A. § 60-412 (A.C.A. § 28-24-101)

This is a restatement of Section 14522, Pope's Digest in the language of the 1949

Probate Code, without any change in the substance.

Committee Comment to A.S.A. § 60-413 (A.C.A. § 28-26-105)

This restates, without change in substance, Section 14523, Pope's Digest.

Committee Comment to A.S.A. § 60-414 (A.C.A. § 28-24-102)

Ademption is the revocation or taking away of a devise, ordinarily by the personal act of the testator in the selling of specifically devised property. It is not the purpose of the 1949 Probate Code to treat generally of the law of ademption, but the

committee feels that this section would prevent many inequities from resulting where the testator became mentally incompetent and the guardian disposed of specifically devised property. Since the sale of items of property can, to a large

measure, be controlled by the judgment of the guardian, it seems to the committee that this provision would prevent gross injustice resulting from an act of the

guardian at a time when the testator was unable to exercise control of his property, or to change the provisions of his will.

Committee Comment to A.S.A. § 60-415 (A.C.A. § 28-25-108)

Section 14514, Pope's Digest is in substantial harmony with the draft.

Committee Comment to A.S.A. § 60-416 (A.C.A. § 28-26-101)

Authority to construe a will has already been mentioned in Section 4 [§ 62-2004 (A.C.A. §§ 28-1-104(a)-(c), 28-1-105, 28-1-111, 28-1-114(b))]. The transfer of a pro-

bate proceeding to another court is covered in Section 41c [§ 62-2102 (A.C.A. § 28-40-102)].

Committee Comment to A.S.A. § 60-501 (A.C.A. § 28-39-401)

The 1949 Probate Code does not alter or in any manner affect the substantive law of dower, curtesy, and homestead. It deals exclusively with procedure relating to election to take against the will and not

rights of the person so taking. Nor has there been any attempt to deal with procedure for assignment of dower, curtesy or homestead.

Committee Comment to A.S.A. § 60-507 (A.C.A. § 28-39-407)

This is a restatement, with an effort at clarification of Sections 14524 and 14525, Pope's Digest. Section 14526, Pope's Digest, is omitted because the committee feels that it is not necessary to designate the court or courts in which the pretermitted child may have his remedy if the

administration of the estate has been completed, or so nearly completed as not to allow him a complete remedy in the distribution of that portion of the estate remaining undistributed at the time his rights are adjudicated.

Committee Comment to A.S.A. § 62-2004 (A.C.A. §§ 28-1-104(a)-(c), 28-1-105, 28-1-111, 28-1-114(b))

Amendment No. 24 to the Constitution, adopted November 28, 1938, defines the jurisdiction of Probate Courts. By it the "judge of the court having jurisdiction in matters of equity" shall be judge of the Court of Probate. Article 7, Section 15 of the Constitution of 1874 provides that until the General Assembly shall establish Courts of Chancery, the Circuit Court shall have jurisdiction in matters of equity. Subsequently Courts of Chancery were created by the Legislature.

The foregoing section follows each enumeration of jurisdictional functions granted in Amendment No. 24 and adds determination of heirship, adoption, and concurrent jurisdiction to construe wills, and establish lost wills. Adoption is cov-

ered by existing statutes and is not embraced in the 1949 Probate Code. The determination of heirship and the right to construe wills and establish lost wills concurrently are additions to the general grant of jurisdictional control over estates of decedents and probate of wills pursuant to the authority contained in Amendment No. 24. Amendment No. 24 gives exclusive jurisdiction to Probate Courts relative to matters above enumerated and such other matters as "may be hereafter prescribed by law." Subsection d above embodies and enlarges upon the provisions of Act 268 of 1945 [Repealed], which in turn, was an enlargement of Act 3 of 1939 [Repealed] and Act 417 of 1941 [§§ 22-437 — 22-440 (A.C.A. § 16-13-311), 22-503 — repealed].

Committee Comment to A.S.A. § 62-2006 (A.C.A. § 28-1-106(a) and (b))

Provision for referees in probate is to be found in Act 448 of 1941 [§§ 22-508 — 22-512 (A.C.A. §§ 16-14-201 — 16-14-

205)] as amended by Act 84 of 1943 [§ 22-508 (A.C.A. §§ 16-14-202 — 16-14-204)].

Committee Comment to A.S.A. § 62-2008 (A.C.A. § 28-1-106(c))

Section 19 of Article 7 of the Constitution defines who shall be clerk of the probate court.

It is our thought that in outlining the

general powers of the clerk it is desirable to avoid the granting of any general power which might be construed as vesting a quasi-judicial power in the clerk.

Committee Comment to A.S.A. § 62-2014 (A.C.A. § 28-1-107)

To the same effect see Act 3 of 1939 [§§ 22-502 — 22-504 — repealed].

Committee Comment to A.S.A. § 62-2016 (A.C.A. § 28-1-116)

The provisions of subsections c and d for postponing appeals as to particular orders are designed to mitigate the evils involved in permitting numerous appeals to the

Supreme Court in the same probate proceeding.

Subsection f is in conformity with Section 2886, Pope's Digest [Repealed].

Committee Comment to A.S.A. § 62-2103 (A.C.A. § 28-40-105)

Section 14533, Pope's Digest, provides for the production of a will. The foregoing draft further provides for civil liability

because of refusal to produce a will. The committee feels that this is declaratory of the common law.

Committee Comment to A.S.A. § 62-2105 (A.C.A. § 28-40-107(a) and (b))

Section 14560, Pope's Digest [§ 60-301 (A.C.A. § 28-40-301)], covers establishment of a lost will in chancery. The Probate Court is given concurrent authority

by Section 4 [§ 62-2004 (A.C.A. §§ 28-1-104(a)-(c), 28-1-105, 28-1-111, 28-1-114(b))] and 56 [§ 62-2117 (A.C.A. § 28-40-117(a)-(c))] of the 1949 Probate Code.

Committee Comment to A.S.A. § 62-2106 (A.C.A. § 28-40-107(c))

The foregoing meets every venue factor of Section 41 [§ 62-2102 (A.C.A. § 28-40-102)] and requires information which is obviously helpful, if not necessary.

Contents of the application for letters testamentary or of administration and of petition for probate are covered by Section 16 et seq., Pope's Digest.

Committee Comment to A.S.A. § 62-2108 (A.C.A. § 28-40-108(b))

This section is new and is believed to be salutary. The committee is strongly in favor of a change in probate procedure which will assure interested parties actual notice of any proceedings in an estate in which they may be interested.

It should be noted that there is no amplification in this section of the form of notice or method of delivering it since Section 14 [§ 62-2014 (A.C.A. § 28-1-107)] is an overall section governing the subject of notice.

Committee Comment to A.S.A. § 62-2109 (A.C.A. § 28-40-109)

The committee feels that the appointment of an administrator, even in the case of intestacy, is a judicial act and should be performed by the court as distinguished

from the clerk. The committee feels that the admission of a will to probate is a judicial act and should not be delegated to the clerk as a ministerial act.

Committee Comment to A.S.A. § 62-2110 (A.C.A. § 28-40-110)

This section gives the court jurisdiction over the property even if the person whose estate is to be administered be not in fact deceased. It should be pointed out that under the provisions of Section 61 [§ 62-2122 (A.C.A. § 28-40-121)] of the 1949 Probate Code even if the court has jurisdiction over the presumed deceased when

he is not in fact dead, he has a very good chance of recovering his property. However, his attack on the probate proceedings must be direct. He cannot make a collateral attack. Thus, the personal representative who has acted in good faith and persons who have delivered property to him are protected.

Committee Comment to A.S.A. § 62-2111 (A.C.A. § 28-40-111) (1967 Amendment)

It is felt that this Section of the 1949 Probate Code should be made more specific as to the time within which a copy of the notice should be served upon heirs and devisees. This becomes important in certain fact situations in determining the time within which a will may be contested under Section 62-2114 (A.C.A. §§ 28-40-113(b), 28-40-115).

The Committee considered recommending change of the word "promptly" in this Section to provide more specifically the time within which a personal representative would be required to cause publication of a notice of his appointment, but decided not to recommend such change. Changes are being recommended, however, in Section 62-2114 (A.C.A. §§ 28-40-113(b), 28-40-115), which will make the law more specific as to the time within

which a will contest must be filed, even when a notice of appointment of a personal representative has not been filed "promptly".

The proposed amendment makes clear a point which is not entirely so in the present law, that a will may be probated without having an administration of the estate of the testator.

In the last paragraph of the Section, the proposed amendment changes the word "shall" to "may", so that when there is some doubt as to whether the value of the estate to be administered upon does or does not exceed \$1,000.00 exclusive of homestead, the notice may be given by publication even though it may subsequently develop that the value of the estate exclusive of homestead is less than \$1,000.00.

Committee Comment to A.S.A. § 62-2112 (A.C.A. § 28-40-112)

While the situation to which this section applies will infrequently occur, the committee feels that the inclusion of this provision would be of occasional benefit. Furthermore the requirements of due process against the decedent seem to be satisfied

so as to make the administration of his estate valid as to the personal representative and persons who have delivered property to him in good faith prior to the discovery that the alleged decedent was alive.

Committee Comment to A.S.A. § 62-2113 (A.C.A. § 28-40-113(a))

No attempt has been made to enumerate the grounds of contest.

The annotation at 62 A.L.R. 1129 supports the proposition that the great weight of authority permits an attack on a

portion of a will procured by undue influence provided that the parts so affected are separable and that the remainder is complete and intelligible.

Committee Comment to A.S.A. § 62-2116 (A.C.A. § 28-40-116)

This Section and Sections 53 [§ 62-2114 (A.C.A. §§ 28-40-113(b), 28-40-115)] and 54 [§ 62-2115 (A.C.A. § 28-40-114)] overlap somewhat, but all are necessary. A subsequently presented will may have a double function: it may revoke a prior will and thus be the basis of a contest of that prior will, and it may also contain dispositive provisions which the proponent wishes to have recognized by securing its probate. Sections 53, 54 and 55 [§§ 62-2114 (A.C.A. §§ 28-40-113(b), 28-40-115), 62-2115 (A.C.A. § 28-40-114), 62-2116 (A.C.A. § 28-40-116)] provide that the contest of the old will and the probate of the new are both determined at the same hearing.

However, the attempted probate of another will may not necessarily constitute a contest of the first. Thus, if the testator makes one will disposing of all his real estate and another will disposing of all his personal estate, these wills are obviously not inconsistent. Nevertheless, since the

order admitting the first of these wills to probate would be a determination that such will was the testator's last and only will and that as to all property not covered by it he died intestate, it would be necessary to reopen the order or judgment made at the first hearing, but it would not be necessary to revoke the probate of the first will.

Much confusion exists in the statutes and cases as to the matter of introducing a subsequent will. Some jurisdictions bar it by the ordinary period of contest; others allow it to be introduced after the period for contest has expired; some allow it to be probated at any time. Logically, it does not differ from any other newly discovered evidence, and time limitations on contest should apply to it. On the other hand, if a later will is discovered before the order of distribution, it seems reasonable that it should be admitted. This code takes the latter position.

Committee Comment to A.S.A. § 62-2118 (A.C.A. § 28-40-117(d))

Common law rules as to the proof of the execution of wills are assumed to be in force without the necessity of any statute. Thus, if attesting witnesses are not available, it is possible to prove the genuineness of their signatures and to raise a

presumption that the will was duly executed. 5 Wigmore, Evidence (3d ed., 1940) Sections 1511, 1512. *Rogers v. Diamond*, 13 Ark. 474. Section 57 [this section] states the common law rule.

Committee Comment to A.S.A. § 62-2119 (A.C.A. § 28-40-118)

This section applies to holographic as well as attested wills, but has no bearing upon contests after probate.

Committee Comment to A.S.A. § 62-2121 (A.C.A. § 28-40-120) (1949 Act)

This section is a redraft of Section 14534, Pope's Digest, to harmonize this section with Section 21 of the 1949 Probate Code, and with the provisions of the 1949 Probate Code eliminating the distinction between wills of personalty and realty. Where the execution of the will is in accordance with Section 18 [§ 60-402 (A.C.A. § 28-25-102)] of the 1949 Probate Code, the time and place of the will's

execution and the domicile of the testator are not material. Since this code permits the admission to probate of wills which are not executed in accordance with Section 18 [§ 60-402 (A.C.A. § 28-25-102)], the petition for the probate of a foreign will not complying with Section 18 [§ 60-402 (A.C.A. § 28-25-102)] must show affirmatively the facts entitling it to probate in Arkansas.

Committee Comment to A.S.A. § 62-2121 (A.C.A. § 28-40-120) (1967 Amendment)

It is intended by this proposed amendment to clarify matters of venue and notice, where the will of a nonresident of the

State of Arkansas, probated in the State of the decedent's domicile, is probated also in this State.

Committee Comment to A.S.A. § 62-2122 (A.C.A. § 28-40-121)

The effect of the first part of this section is that the order admitting a will to probate determines that it is the last and only effective will of the testator and that the order granting administration to a personal representative, when no will is admitted to probate, determines that the decedent died intestate. Hence, any presentation of a will at a later time can be made only by reopening the order admitting the first will to probate or the order granting administration. However, the later will may be admitted by reopening the order at any time before the order of final distribution is made.

The third exception to the conclusiveness of these orders is with respect to the fact of death. According to the decision in the case of *Scott v. McNeal*, 154 U.S. 34, 38 L. Ed. 896, 14 Sup. Ct. 1108 (1894), an ordinary probate proceeding in which the alleged decedent is not made a party and

is not given notice does not bind him, and he may attack the whole proceeding collaterally. This is because due process requirements have not been complied with. But if reasonable notice is given to the alleged decedent, and he is made a party to the proceeding, he is bound. The form of notice provided for in the 1949 Probate Code makes the alleged decedent a party; and if the steps referred to in exception c hereof are taken, he would receive reasonable notice. This simply means that he is bound by the proceeding and cannot attack it collaterally. But, according to the provisions of this section, he can recover his property to the extent that it is in the hands of the personal representative or distributees. He cannot recover it from creditors, and the personal representative is protected to the extent that he acted in good faith.

Committee Comment to A.S.A. § 62-2123 (A.C.A. § 28-40-122)

Section 14532, Pope's Digest provides for admissibility of will in evidence.

Committee Comment to A.S.A. § 62-2124 (A.C.A. § 28-40-123)

This section is an adaption of Section 14556, Pope's Digest, adding a requirement that the executor, at the expense of

the estate, shall cause the will to be recorded in each county where lands of the estate are situated.

Committee Comment to A.S.A. § 62-2125 (A.C.A. § 28-40-103)

The Committee Comment in the bound volume should read: Although no administration may be granted after five years from the date of death there may be a

determination of heirship under Section 173 [§ 62-2914 (A.C.A. § 28-53-101)] and claims are barred after five years by Section 110 [§ 62-2601 (A.C.A. § 28-50-101)].

Committee Comment to A.S.A. § 62-2127 (A.C.A. § 28-41-101) (1967 Amendment)

This amendment increases from \$1,000.00 to \$3,000.00 the amount of an estate which may be distributed without

appointment of a personal representative when the other necessary conditions have been met.

Committee Comment to A.S.A. § 62-2128 (A.C.A. § 28-41-102)

See Section 1, Pope's Digest, as amended by Act 426 of 1947 [Repealed].

Committee Comment to A.S.A. § 62-2201 (A.C.A. § 28-48-101)

This section follows very closely, but clarifies, the provisions of Section 8 of Pope's Digest in regard to priority of rights as personal representative and includes executors as well as administrators. The provisions of subsection b restore the policy of the law with respect to non-resident personal representatives substantially as it was prior to Act 33 of

1945, and Act 21 of 1943 with the addition of a requirement that such nonresident personal representative have a local agent authorized to accept service in litigation with respect to the estate. Act 190 of 1945 provided that a nonresident who had been named in a will as executor or trustee could serve.

Committee Comment to A.S.A. § 62-2208 (A.C.A. § 28-48-108) (1949 Act)

a. The committee feels that the case law of Arkansas to the effect that an executor who acts under a will fixing the fees for his services, is bound by the schedule named in the will, should be continued.

b. It is the opinion of the committee that situations arise in which the statutory percentages allowed as compensation to a personal representative are inadequate, primarily because a substantial part of the value of the estate of the decedent may consist of real estate. This frequently involves additional services by the personal representative although the title to such real estate does not pass through him. Accordingly provision was

made that the court may in its discretion supplement the statutory percentages allowed where there is a substantial amount of real estate. Often a tremendous amount of time is spent by the personal representative in the evaluation of real estate for estate tax purposes. According to the variety of interests this effort may result in a benefit to persons owning the real estate or to the legatees. For these reasons the court should charge the fee allowed for these services to those who benefit from the efforts.

d. This sub-section substantially reenacts the provisions of Section 117, Pope's Digest.

This section authorizes the employment

of an attorney without a court order, while the other skilled persons may be employed only if employment is authorized by the

will or by the court. There is complete historical and practical justification for the distinction.

Committee Comment to A.S.A. § 62-2208 (A.C.A. § 28-48-108) (1967 Amendment)

The Committee feels that the amount of the allowance of attorneys' fees should be commensurate with the value of the legal services rendered, and that the fee schedule contained in this provision should not be mandatory but merely a guide.

It is also the purpose of the proposed amendment to clarify any uncertainty which might have been created as a result of the decision of *Black v. Thompson*, 235 Ark. 725 (at 729 and 730), 361 S.W. (2d) 753 (1962).

Committee Comment to A.S.A. § 62-2209 (A.C.A. § 28-48-109) (1949 Act)

This section is in harmony with our present case law as expressed in *Quinn v.*

Driver (1940), 199 Ark. 1058, 136 S.W. (2d) 1015.

Committee Comment to A.S.A. § 62-2209 (A.C.A. § 28-48-109) (1967 Amendment)

This amendment is recommended so there will be statutory authority for paying expense of defending or probating a

will, even if this should be done by someone other than the nominated executor or administrator with the will annexed.

Committee Comment to A.S.A. § 62-2211 (A.C.A. § 28-48-201(a))

This section follows closely Act 203 of 1943 which amended Section 22, Pope's Digest. The measure of the amount of the bond is the estimated value of property passing through the hands of the personal representative, which the committee feels is much better than the fixing of a specified minimum based on valuation of the estate, or a particular type of asset. This

section eliminates the obscurity of the language of Section 22, Pope's Digest, as amended, which fixes the amount of the bond on the "estimated value of the estate," which has been construed not to include real property when same does not come into the hands of the personal representative.

Committee Comment to A.S.A. § 62-2212 (A.C.A. § 28-48-206(b) and (c)) (1949 Act)

Provisions of subsection (a) are new to our statutory law but are in harmony with the decisions of our courts. The provision

of subsection (b) is a restatement and condensation of Act 324 of 1937.

Committee Comment to A.S.A. § 62-2212 (A.C.A. § 28-48-206(b) and (c)) (1967 Amendment)

The Committee feels that in many cases where there is a sole beneficiary of the estate or all distributees are adult and in full accord, administration is necessary only for the purpose of clearing title to real estate and settlement of estate taxes, if any. In such cases where no creditors are involved, the requirement of bond, inven-

tory and accounting may be burdensome and serve no useful purpose. On the other hand, in any case where the rights of creditors may be affected or there is any possibility of adverse interests in the estate, the Committee feels that all doubts should be resolved in favor of protecting the rights of such claimants and that in

such cases the requirements of bond, inventory and accounting should be observed unless it can be demonstrated to the Court that there are, in fact, no such adverse interests.

It is believed that the recommended amendment covers a situation where a distributee has filed a waiver and wishes

to withdraw or revoke same, in that when the Court reduces or dispenses with bond, such action is subject to subsequent revocation. If a distributee sought to revoke or withdraw his waiver, the Court would have the power, in a proper case, to revoke its prior action to reduce or dispense with bond.

Committee Comment to A.S.A. § 62-2213 (A.C.A. § 28-48-209)

This is virtually a copy of Act 94 of 1947 [§ 58-105 (A.C.A. § 28-69-101)] with the additional provision that joint control

does not operate to alter the liability of the personal representative and the surety.

Committee Comment to A.S.A. § 62-2221 (A.C.A. § 28-48-208)

The committee is of the opinion that the 1949 Probate Code and the Constitution make it clear that the probate court is one of record with exclusive jurisdiction over matters relative to estates of deceased persons, and, that the provisions of this section are amply justified. Section 672 of the Civil Code, being Section 5262, Pope's Digest, provides for the issuance of execution upon any "final judgment, order or decree of the court of record."

Subsection c affords an interested party the right to proceed separately in a court of competent jurisdiction for the relief he seeks; so in any event the remedy is preserved to the injured party for the recovery of money from a defaulting personal representative and his sureties.

The limitation on actions on the bond appears in Section 8936, Pope's Digest [§ 37-211 (A.C.A. § 16-56-113)].

Committee Comment to A.S.A. § 62-2401 (A.C.A. § 28-49-101)

This section is new. There are many situations in which control of real estate by the personal representative is desirable, even though neither control nor sale be necessary for the payment of claims. For example, serious loss could result if a will were contested, a protracted suit maintained for the construction of a will, or the heirs are beyond the seas or their whereabouts unknown. This section per-

mits a receivership control of real estate for purpose of preservation thereof until rights are determined or beneficial interests ascertained and vested. Such preservation of the real property of the estate may also be desirable when it is not certain, but probably, that there may be need for resort thereto to pay claims, including estate taxes.

Committee Comment to A.S.A. § 62-2402 (A.C.A. § 28-49-109)

This section follows Section 69, Pope's Digest, with the addition that the section is now applicable to personal property and

the proceeds of any property which cannot be recovered, whether real or personal.

Committee Comment to A.S.A. § 62-2403 (A.C.A. § 28-49-104)

This section is consonant with the provisions of Section 121, Pope's Digest, and the common law in Arkansas as stated in Treadway v. St. Louis, I. M. & S. Ry. Co.

(1917), 127 Ark. 211, 191 S.W. 930 and Wilks v. Slaughter (1887), 49 Ark. 235, 4 S.W. 766.

Committee Comment to A.S.A. § 62-2406 (A.C.A. § 28-49-102)

The committee has found no Arkansas Statute dealing with conversion as covered by this section. The case law is sub-

stantially the same as prescribed herein. This section includes and replaces Section 122, Pope's Digest.

Committee Comment to A.S.A. § 62-2408 (A.C.A. § 28-49-105)

The decisions in Arkansas do not recognize the concept of an executor de son tort. *Rust v. Witherington*, 17 Ark. 129,

Barasien v. Odum, 17 Ark. 122. The section merely restates the theory of these cases.

Committee Comment to A.S.A. § 62-2409 (A.C.A. § 28-49-103)

This section supplants Sections 55, 56, and 57, Pope's Digest enlarging the right of discovery on the part of any person interested in the estate and making it clear that the proceedings under this section are limited to those in the nature of

discovery. See *Moss v. Sandefur* (1854), 15 Ark. 381. The right of the probate court to attach property belonging to the decedent is withdrawn since the committee feels that such attachment may more properly be enforced in other courts.

Committee Comment to A.S.A. § 62-2501 (A.C.A. § 28-39-101) (1949 Act)

The committee feels that the allowance of \$300 to the widow and children should be raised to \$500 as against creditors and \$1000 as against next of kin and legatees. These amounts represent no greater purchasing power today than the smaller amounts at the time of the earlier legislation.

The committee cannot make it too plain that it has not touched the substantive law of dower, curtesy and homestead. In the foregoing section it has endeavored to collect under one head all statutory allowances on account of death, as distinguished from dower, curtesy and homestead.

Committee Comment to A.S.A. § 62-2501 (A.C.A. § 28-39-101) (1967 Amendment)

The Committee recommends amendment of subsection a, in accordance with changed economic conditions since the Probate Code was first enacted, to provide allowances of \$2,000 as against distributees, or \$1,000 as against creditors.

It is also recommended that subsection a be amended to provide that the allowances are vested, and therefore qualify under the marital deduction provisions of the Federal Estate Tax Act. This part of the recommended amendment is based

upon Public Act No. 370 of the Connecticut Legislature, effective October 1, 1961, discussed in *Second National Bank of New Haven v. United States*, 222 F. Supp. 446 (D. Conn. 1963), stating that the Connecticut amendment qualifies the widow's allowance for the marital deduction.

The Committee also recommends amendment of subsection a to clarify its application to the situation where there may be minor children in the home who are not minor children of the decedent.

Committee Comment to A.S.A. § 62-2601 (A.C.A. § 28-50-101)

Although subsection a. provides that a claim of the state or subdivision thereof is barred unless the claim is presented within a required period, the right of the state, or a subdivision thereof, to enforce a

claim for taxes or other indebtedness, which by statute is secured by a lien, is preserved in subsection e. The committee feels that any claim of the state, or a political subdivision thereof, other than a

lien claim for taxes, should stand on a parity with claims of natural persons or corporations against the decedent's estate.

Committee Comment to A.S.A. § 62-2603 (A.C.A. § 28-50-103)

The foregoing re-enacts substantially Sections 101-104, Pope's Digest, but in fewer words. Section 105, Pope's Digest, entitled "Nonsuit of unverified demand" is not re-enacted. This section provided for the dismissal of the claim if it had not been verified prior to the filing of an action against the personal representative.

Committee Comment to A.S.A. § 62-2604 (A.C.A. § 28-50-104) (1967 Amendment)

The Committee recommends amendment to authorize the use of ordinary mail rather than registered mail. It appears that in several counties in the State, Clerks are using ordinary mail to notify the personal representative of the filing of claims, and in the opinion of the Committee the additional trouble and expense of registered mail is not justified in this situation.

Committee Comment to A.S.A. § 26-2605 (A.C.A. § 28-50-105) (1949 Act)

The purpose of subsection c. is to permit a personal representative to pay small claims against the decedent's estate without the necessity of any formal claim whatever. Under the present law, if the personal representative makes such payments, he does so at his peril, even though the debt paid may be valid. The personal representative must, if his acts are questioned, establish the validity of any of these small claims which he has paid. This subsection is intended to permit the payment of utility bills and other household expenses which have accrued within a short time before the decedent's death, although by its terms it may also be used for other claims. It is designed to reduce the cost of administration involved in the filing of small claims, whose validity is not subject to question.

Committee Comment to A.S.A. § 62-2605 (A.C.A. § 28-50-105)(1967 Amendment)

This recommended amendment [subsec. a.] is intended to change the holding of *Brown v. Hanauer* (1887), 48 Ark. 277 (at 281-282), 3 S.W. 27, that the 10-year statute of limitations generally applicable to judgments does not begin to run until the closing of an estate. It is also intended to change the holding of *Rose v. Thompson*, 36 Ark. 254 (1880), that the statute for reviving judgments does not apply to Probate Court judgments. In view of the change in economic conditions since the Probate Code was first enacted in 1949, the Committee recommends change of this subsection c. to the extent of authorizing payment of claims before they have been formally allowed, not to exceed \$600.00 in the aggregate, and not to exceed \$50.00 for any one claim.

Committee Comment to A.S.A. § 62-2609 (A.C.A. § 28-50-109) (1949 Act)

This section clarifies procedure with reference to secured claims not covered by our existing statutes, but in a manner the committee believes to be in harmony with the policy of our law as expressed by judicial decisions. On first impression there may be thought to be a duplication in the provisions in subsection e. with reference to the Probate Court authorizing a sale of the equity in property which the decedent has mortgaged or pledged, and the similar process found in Section 98 (A.C.A. 5 28-49-108). It will be observed, however, that Section 98 (A.C.A.

§ 28-49-108) applies to encumbered assets of the estate, irrespective of whether the secured creditor has filed a claim against the estate, whereas Section 118

(A.C.A. § 28-50-109) applies only to the case in which the creditor has voluntarily filed a claim which is secured.

Committee Comment to A.S.A. § 62-2609 (A.C.A. § 28-50-109) (1967 Amendment)

Read literally, Section 62-2609 (A.C.A. § 28-50-109) would give the Probate Court jurisdiction of all property which is security for a secured claim, but it cannot apply to the security given to a creditor by a codebtor, not the decedent, on a contingent claim. For example, it could not apply where the maker of a note has given a mortgage to the payee-creditor, and the decedent was an indorser or guarantor, and there has been no default on the note. The claimant (payee-creditor) cannot sur-

render the security to the decedent's estate, and since the main debtor is not in default, the claimant cannot foreclose the mortgage. The proposed amendment would clarify the Section by providing that it does not apply to contingent claims, except as to security given by the decedent to the creditor who has the contingent claim. Contingent claims excluded from this Section are covered under Sections 62-2610 (A.C.A. § 28-50-110) and 62-2611 (A.C.A. § 28-50-111).

Committee Comment to A.S.A. § 62-2610 (A.C.A. § 28-50-110)

This section covers (a) claims which do not become absolute prior to the order of distribution of the estate, in which cases the creditor may elect to file his claim, (b) claims which are contingent at the inception of the estate but which become absolute at least six months prior to the order of final distribution, in which case there is the requirement that the claim be filed, and (c) the rights of the holders of contingent claims who were not required to and did not present their claims (whose rights are not barred thereby) and whose claims become absolute more than six months prior to the order of final distribution.

As early as 1853 in *Walker v. Byers*, 14 Ark. 246, the Supreme Court held that there was no requirement to file a contingent claim against an estate. Upon the claim becoming absolute subsequent to the termination of the estate, the court held that the creditor could pursue the distributees to the extent of the property received by them.

Hall v. Cole, 71 Ark. 601, 76 S.W. 1076 (1903), and *Planters' Mutual Insurance Association v. Nelson*, 80 Ark. 103, 96 S.W. 123 (1906), also state the rule that equity will enforce contribution out of lands held by the heirs in an action by a contingent creditor whose claim had matured.

It is to be observed that the distributee is liable, in the case of the contingent creditor who files his claim, to the extent of the estate received by him, as distinguished from the lesser liability to the contingent creditor whose unfiled claim becomes absolute after administration.

Numerous decisions of the Supreme Court hold that a contingent creditor may obtain satisfaction out of assets passing to the distributee and remaining in his hands; and several cases specifically hold that the property passing into the hands of an innocent purchaser cannot be reached by the creditor (*Wallace v. Swepston* (1905), 74 Ark. 520, 86 S.W. 398). The committee has found no case in Arkansas directly passing on the liability of a distributee who has disposed of the property he received.

The rule of the Supreme Court seems to be that a distributee in the case of a creditor with a contingent claim which became absolute after the termination of the estate, is personally liable to the extent of the value of the property received by him. The foregoing section, however, limits the liability in such cases to the property received by the distributee or its proceeds remaining in the hands of the distributee.

Committee Comment to A.S.A. § 62-2612 (A.C.A. § 28-50-112)

This confers authority upon the personal representative to compromise a claim against the estate in a manner similar to the authority conferred by Section 96 [§ 62-2403 (A.C.A. § 28-49-104)] to compromise a claim due the estate.

The case rule permitting a personal representative to compromise a claim due the estate (now authorized by Section 96 [§ 62-2403 (A.C.A. § 28-49-104)] of the 1949 Probate Code) was that no authority of court was required and that the per-

sonal representative could proceed to act and cast the burden upon those who would impeach his conduct to show fraud or mistake, even though the statute provided for approval of such compromise by the court; *Treadway v. St. Louis I. M. and S. Ry.* (1917), 127 Ark. 211, 191 S.W. 930, and *Wilks v. Slaughter* (1887), 49 Ark. 235, 4 S.W. 766. The statute there involved is Section 121, *Pope's Digest* [§ 62-417 — repealed].

Committee Comment to A.S.A. § 62-2704 (A.C.A. § 28-51-103(a)-(c))

Sections 124 [§ 62-2701 (A.C.A. § 28-51-101)] and 127 [this section] represent a substantial change in the law, in that they abolish any priority as between real or personal property being resorted to for the purpose of payment of claims against the estate or expenses of administration, including taxes. It is the thought of the committee that the conditions which gave rise to the policy of our law that the personal property of an estate should be exhausted before resorting to the real property for the payment of debts and cost of administration no longer prevail. This policy was adopted when the economic organization of our state was built almost entirely around agricultural operations, and land was almost invariably the property of primary importance to the surviving spouse and heirs of the decedent.

Under modern conditions various types of personal property, including corporate stocks, are frequently more desirable for providing security for the widow and heirs of a deceased, than real property. The committee, therefore, has made bold to make a definite change in the policy of our law on this point.

The idea of vesting a court with discretion to sell real property in an instance not involving the payment of debts with the proceeds is not new. Section 136, *Pope's Digest* [§ 62-2713 (A.C.A. § 28-51-203)], authorizes the court to order the sale of real property whenever in the judgment of the court "it would be materially to the advantage of the estate to make such sale, and to reinvest the proceeds of the sale in other lands or securities of any kind."

Committee Comment to A.S.A. § 62-2706 (A.C.A. § 28-51-103(e))

This section affords to a creditor the same relief afforded by Sections 167 to 170, *Pope's Digest* [§§ 62-2908 — 62-2911 (A.C.A. §§ 28-53-113 — 28-53-117)] that is to say, a means for requiring a sale of the property of the estate for the payment of debts, without setting up an entirely distinct procedure for the sale of such

property as is done by the existing law. This section also affords the same power to a distributee or other person interested in the estate, who may desire to force the sale of assets to avoid loss by deterioration, or for other equally imperative reasons.

Committee Comment to A.S.A. § 62-2714 (A.C.A. § 28-51-301) (1967 Amendment)

The only change to be effected by this amendment is to increase the value of properties sold without requirement of notice to \$1,500.00. In view of the inflated dollar values of property since the original 1949 Probate Code was enacted, it is felt

this is a realistic consonant change. Similar changes, for similar reasons are recommended in other Sections of the 1949 Probate Code relative to stated dollar values.

Committee Comment to A.S.A. § 62-2719 (A.C.A. § 28-51-305) (1967 Amendment)

The Committee heard expressions from many lawyers and Judges that the requirement for a 5-day lay-over period between report of sale and confirmation thereof serves no useful purpose, because a private sale, having been first authorized after notice to interested persons, by its very nature is of interest only to the

selling estate and the private purchaser. Thus, a report of sale, reflecting conformity to order of sale, can be immediately approved and confirmed without the 5-day delay relating to public sales, and without an additional formal order of approval and confirmation in extenso.

Committee Comment to A.S.A. § 62-2720 (A.C.A. § 28-51-306)

This section simplifies land title problems by making the deed of the personal representative and the order of the court confirming the action, adequate and sufficient evidence to be recorded and shown on the abstract of title for the purpose of showing a marketable title, thus eliminating the necessity of showing all the inci-

dental steps in the Probate proceedings.

A parallel is found in the provisions relating to Commissioners' deeds, which require the recitation of the order of confirmation. See Sections 1816-1823, Pope's Digest [§§ 30-501 — 30-508 (A.C.A. § 16-66-116)].

Committee Comment to A.S.A. § 62-2721 (A.C.A. § 28-51-307)

The committee is aware that most, if not all, of the foregoing provisions have already been covered by Section 77 of the

1949 Probate Code [§ 62-2208 (A.C.A. § 28-48-108)].

Committee Comment to A.S.A. § 62-2801 (A.C.A. § 28-52-101)

Subsection b(1) (A.C.A. § 28-52-101(b)(1)) covers cases of damages received under wrongful death statutes, or appointed property where the decedent was the donee of a general power of appointment and was insolvent. This section also covers the situation where the personal representative takes possession of property which he erroneously believes to belong to the decedent individually.

Subsection b(2) (A.C.A. § 28-52-101(b)(2)) includes a situation where a personal representative commingles the proceeds of a life insurance policy with assets of the estate, although the estate is not the beneficiary of the policy. For a discussion of this matter, see 29 Va. L. Rev. 951 (1943).

Committee Comment to A.S.A. § 62-2810 (A.C.A. § 28-52-109)

The majority of the committee feels that the provision for sixty days publication of notice of the filing of the account, in conjunction with the provision of Section 47 [§ 62-2108 (A.C.A. § 28-40-108(b))] to the effect that any interested person may file

with the clerk of the court a request entitling him to special notice of each substantial step taken in connection with the administration of the estate, makes adequate provision for notice where special notice is desirable.

Committee Comment to A.S.A. § 62-2902 (A.C.A. §§ 28-53-103 — 28-53-106)

This section contemplates that a final account will normally include a petition for an order specifically directing final distribution of the assets of the estate; but at the discretion and at the risk of the personal representative, he may make final distribution of the estate and incorporate a report thereof in his final account; in which latter case the order may approve the final account, and also expressly approve and be conclusive as to the distribution previously made. If the final account does not include a report of, but rather prays authority for an order authorizing final distribution, there will be a

further and final order approving the report of final distribution. As a matter of nomenclature, it is contemplated that the final account will be known as such, although it does not include a report of final distribution but prays for an order directing such distribution.

The committee feels that the order of final distribution should completely bar all persons who may have a right to object to any of the proceedings as to any matter which might be the basis of their objections. It does not bar third persons who would have no right to intervene in the proceedings or to object to the order.

Committee Comment to A.S.A. § 62-2903 (A.C.A. § 28-53-107)

A testator may determine the order in which the assets of his estate are applied to the payment of his debts and legacies. If he does not, then the provisions of this section lay down rules which may be regarded as approximating his intent. However, his intent may be indicated not only by an express designation of a property or fund or by an express statement of the order in which assets are to be applied, but also by the implied purpose of the devise or by the general testamentary plan. Thus, it is commonly held that, even in the absence of statute, general legacies

to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the testator. Moreover, the general testamentary plan is often important in determining matters of abatement when the surviving spouse elects to take against the will. The same may be true where abatement takes place to provide for the share of a pretermitted heir. The provisions of subsection b embrace these and other situations of similar character.

Committee Comment to A.S.A. § 62-2905 (A.C.A. § 28-53-109)

This section relates only to procedure and does not affect the substantive law of

advancement presently found in Sections 4353, et seq., of Pope's Digest.

Committee Comment to A.S.A. § 62-2908 (A.C.A. § 28-53-113)

It is believed that the intention of a decedent who has incurred indebtedness secured by a mortgage or pledge is more likely to be accomplished by the discharge of the indebtedness out of the general estate as he would have done had he lived, than by requiring the indebtedness to be paid out of the mortgaged security. The holder of the lien could have, in any event, filed his claim against the estate and this declaration of policy merely precludes a

subrogation suit by reason of the payment of a secured debt, since the intention of the testator or decedent might not have contemplated any such reallocation of his assets. This is particularly true in the case of homesteads which under intestacy law would pass to a widow whose interest might be limited from the standpoint of time, and any contrary view might well place upon her a burden which would exceed her homestead benefits.

Committee Comment to A.S.A. § 62-2909 (A.C.A. § 28-53-114)

Section 95, Pope's Digest [§ 62-1025 — repealed].

Committee Comment to A.S.A. §§ 62-2911 (A.C.A. §§ 28-53-116 and 28-53-117) (1949 Act)

Escheats are covered by Sections 5087 — 62-1832 (A.C.A. §§ 28-13-102, 28-13- through 5118, Pope's Digest [§§ 62-1801 104 — 28-13-112]).

Committee Comment to A.S.A. § 62-2911 (A.C.A. §§ 28-53-116 and 28-53-117) (1967 Amendment)

By definition in Section 3 (§ 62-2003 (A.C.A. § 28-1-102)), "distributee" includes a devisee, an heir, or a surviving spouse. "Heir" does not include a surviving spouse. Section 173 (§ 62-2914 (A.C.A. § 28-53-101)) authorizes a petition to determine heirship. Section 170 (§ 62-2911 (A.C.A. §§ 28-53-116 and 28-53-117)) authorizes sale of non-liquid assets distributable to a distributee. The Committee believes both Sections should be amended to permit, in a proper case, a proceeding under Section 173 (§ 62-2914 (A.C.A. § 28-53-101)) to determine spouseship; and under Section 170 (§ 62-

2911 (A.C.A. §§ 28-53-116 and 28-53-117)), a sale of a missing spouse's interest, such as by dower or curtesy including, if just cause shown, the entire assets of which the missing spouse's (or other distributee's) distributable share forms a part.

The proposed amendment also provides that in a case where funds distributable to a missing distributee are to be held by the Clerk of the Court in safekeeping, such funds shall, if deposited in a financial institution, be placed in a formal deposit which will draw interest.

Committee Comment to A.S.A. § 62-2912 (A.C.A. § 28-53-118)

The courts in this state have settled the law concerning fraud in settlement of accounts of personal representatives. The language of the 1949 Probate Code with regard to settlement of accounts follows that of Section 189 of Pope's Digest. The judicial decisions under Section 189,

Pope's Digest, will therefore be applicable to this section of the 1949 Probate Code. The probate court is given jurisdiction to reopen a settlement in the event of fraud rather than requiring the party to go into chancery before the same judge in an independent suit.

Committee Comment to A.S.A. § 62-2914 (A.C.A. § 28-53-101) (1967 Amendment)

See Committee Comment under proposed amendment to Section 170 (§ 62-

2911 (A.C.A. §§ 28-53-116 and 28-53-117)).

Committee Comment to A.S.A. § 62-3101 (A.C.A. § 28-42-102)

At the present time there is little statutory law in Arkansas or elsewhere on ancillary administration. The case law on the subject is far from satisfactory and has been productive of many expensive conflicts. The foregoing sections mould a domiciliary and ancillary administrations (however many the facts require) into a

judicial unit without sacrificing any right or benefits in favor of residents of this state. The administration of a decedent's estate is a proceeding in rem and all administrations pertaining to the same estate should have a definite and mobile connection with the domiciliary administration. The foregoing provisions permit

broad handling by the domiciliary and ancillary administrations of all matters in which they are mutually interested, and, at the same time, effective safeguard is given to the residents of this state.

In those cases where a nonresident may be permitted to serve as ancillary personal representative, the nonresident is amenable to process and notice in this state through the appointment of an agent for the purpose of service of process and

notice. The committee regards this provision as necessary. The court has a wide latitude of discretion as to permitting the domiciliary personal representative to serve as ancillary personal representative in this state, and in all cases may require a local resident to serve as ancillary personal representative where such an appointment be in the best interest of the estate.

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT (§ 28-2-101 ET SEQ.)

Prefatory Note

See Prefatory Note, under the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, *infra*.

Prefatory Note to Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act

There are many instances in which, either because of failure to plan effectively or because of unforeseen change of circumstances, transfers at death or gifts impose unexpected expense or hardship upon the recipients. The hardship is particularly acute when the assets are limited.

More efficient utilization of limited resources by the family and other estate planning objectives, which for one reason or another cannot be attained before death, can sometimes be accomplished after death by recourse to the common law right of renunciation, or "disclaimer" — a right which is recognized in virtually every state as holding that a gift under a will cannot be forced upon the legatee if he chooses not to accept it. However, even though the right to disclaim is well established, the common law principles leave much to be desired in the way of completeness and certainty.

Historically, only gifts under a will, i.e., testate successions, could be renounced; for reasons related to feudalism an heir was not permitted to reject his intestate share.

The right to make partial disclaimers has, under common law, depended on whether the gift is severable. If the will gives Blackacre and Whiteacre to A, he can accept Blackacre and renounce Whiteacre, but if the will gives him only Blackacre, he cannot accept half and reject the other half. If the will gives B a \$1,000 legacy, he may not, it seems, accept \$500 and reject the balance.

While the basic right has been recognized, the procedure for accomplishing a disclaimer, the time limits for doing so, the disposition of the disclaimed property,

and the effect of the disclaimer on the rights of others are often unsettled. Legislation is needed to strip away historical limitations and provide clear procedures.

In some states codifiers have been unwilling to include in a probate code statutes relating to deeds and contractual arrangements such as trusts and insurance. For this reason, companion uniform acts have been proposed, one dealing with transfers at death and the other with inter-vivos transfers. A third act, being an integration of the separate acts, was developed for use in states where the codification system is able to accommodate a single law dealing with both types of transfers and where a single statute is preferred.

The uniform acts are generally similar to legislation developed by the Section on Real Property, Probate and Trust Law of the American Bar Association in 1968 and published in the Summer of 1968 Journal of that Section. The A.B.A. proposed legislation was in turn based upon § 58 of the Model Probate Code (1948) which extended the right of disclaimer to intestate as well as testate succession and permitted partial as well as full disclaimers, and on § 15b of the Illinois Probate Act (1961) which applied the right of disclaimer to future interests and to interests under the exercise of a power of appointment. This latter was dictated by the frequency with which modern-day wills or trust agreements leave property on a life estate (legal or equitable) to a widow, with remainder to the decedent's children. If a child should wish to disclaim his share, the common law has been unclear on which he must renounce and by what method. See Estate of Page, 113 N.J. Super. 582, 274

A.2d 614 (1970). Although many states have legislation reflecting those concerns, the statutes are varied in the coverage and procedures employed, resulting in much confusion and uncertainty.

The disposition of disclaimed property has been one of the more difficult problems presented in legislation on disclaimers. The approach taken in the Acts is to analogize disclaimer to lapse and dispose of the renounced interest as if the disclaimant had predeceased the testator in the case of a disclaimer of a present interest and as if the disclaimant had predeceased the termination of the preceding interest in the case of a disclaimer of a future interest.

As respects the time for making disclaimer, the common law imposed only a requirement of reasonableness. The Conference concluded that a specific period had merit and suggests 9 months. The longer the time allowed, the greater the risk of conduct inconsistent with rejection of the gift and indicative of implied acceptance; the shorter the time allowed, the greater the risk of not having full information for intelligent action. See *Broadhag v. U.S.*, 319 F.Supp. 747 (S.D. W.Va.1970).

The Acts codify the doctrine of "relation back", which has the effect of preventing a succession from becoming operative in favor of the disclaimant. They also declare

that the relation back shall be "for all purposes" which would include creditors and taxing authorities, and it has been so held under similar statutes. *Estate of Hansen*, 109 Ill.App.2d 283, 248 N.E.2d 709.

The Acts specifically state that a limitation in the nature of a spendthrift provision or similar restriction will not affect the right to disclaim.

The Tax Reform Act of 1976 introduced into the Internal Revenue Code the concept of a "qualified disclaimer" by the addition of Section 2518, and, for transfers creating an interest in a disclaimant made after 1976, the requirements of that Section must be met in order for a disclaimed interest to be treated as never having been transferred to the disclaimant for Federal estate, gift and generation-skipping tax purposes. As to the manner of making disclaimer, the Acts are consistent with the new Federal requirements. As to the time for making disclaimer, the Acts incorporate the time requirements of Section 2518 only for disclaimers which are subject to that Section and which specifically state that they are intended to qualify thereunder; the preexisting (and generally more liberal) time requirements have been retained for disclaimers not subject to that Section or not intended to qualify thereunder.

Comment to § 1 (A.C.A. § 28-2-101)*

This Act mirrors the provisions of the separate disclaimer Acts and is designed for application in states where the codification system lends itself to a single Act affecting successions and transfers whether derived from testamentary or nontestamentary sources.

The comments made with respect to the testamentary Act and nontestamentary Act are applicable to this Act.

*The Arkansas version is different from this section of the uniform act.

Comment to § 11*

This Act mirrors the provisions of the separate disclaimer Acts and is designed for application in states where the codification system lends itself to a single Act affecting successions and transfers whether derived from testamentary or nontestamentary sources.

The comments made with respect to the

testamentary Act and nontestamentary Act are applicable to this Act.

*This section of the uniform act was not adopted by the Arkansas General Assembly and was not codified in the Arkansas Code.

UNIFORM SIMULTANEOUS DEATH ACT (§ 28-10-101 ET SEQ.)

Prefatory Note

After more than five years' study a Uniform Simultaneous Death Act has been approved by the National Conference of Commissioners on Uniform State Laws and recommended to the various legislatures for adoption. Two considerations justify the hope that the Act which is presented herewith will be received favorably by the legislative bodies of the various States. It may be a sad commentary, but the pace of modern living with its multiple forms of transportation has caused the instances of simultaneous death to occur with much greater frequency than in the past. More and more therefore courts will be called upon to administer the estates of persons who have died under circumstances that there is no evidence of survivorship and it is desirable to have a workable and uniform rule to apply in such instances. The second consideration which should recommend this Act to the various legislative bodies is the unsatisfactory variety of methods that have been devised either as a result of jurisprudence or the result of legislation to administer this troublesome legal situation. Some States have set arbitrary presumptions which are employed by the courts to determine the devolution of property. In other States there is the "common law rule" which indulges no presumption one way or the other and leaves the matter to the respective claimants to prove survivorship. Both situations seem to be unrealistic. Prescribed presumptions frequently ignore the facts of life. For instance in some States it is presumed (conclusively) that an adult in good health survives a minor child or infant. If the minor happened to be the son or daughter

of the adult it is more reasonable to suppose that the adult would have used every expedient to protect the child even at the sacrifice of his own life. In those States where there is no presumption whatever indulged courts are faced with an anachronism. The reason for the difficulty of administration is that it is impossible to know which of the persons has survived. Yet the "common law rule" in effect says that the person who claims by virtue of an alleged survivorship must prove the survivorship which is tantamount to demanding the impossible.

The theory of the present Act makes no effort whatever to resolve the unresolvable. The formula is a simple one and easily applied. The theory of the present Act is that as to the property of each person he is presumed to be the survivor and it is administered accordingly.

Perhaps a word ought to be said with respect to Section four which deals with contracts of insurance. The Act provides that when the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived. Obviously this section creates a conclusive presumption. The special circumstances seem to justify the creation of a presumption relative to the survivorship of the insured or beneficiary. By providing that the insured presumably survived it is thought that the result will most nearly approximate the intention of the real party in interest. If it does not, he is at liberty to provide otherwise in the contract of insurance.

UNIFORM DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH ACT

(§ 28-12-101 ET SEQ.)

Prefatory Note

Frequently spouses, who have been domiciled in a jurisdiction which has a type of community property regime, move to a jurisdiction which has no such system of marital rights. As a matter of policy, and probably as a matter of constitutional law, the move should not be deemed (in and of itself) to deprive the spouses of any preexisting property rights. A common law state may, of course, prescribe the dispositive rights of its domiciliaries both as to personal property and real property located in the state. California's development of its "quasi-community property" laws illustrates the distinction.

The common law states, as contrasted to California, have not developed a statutory pattern for disposition of estates consisting of both separate property of spouses and property which was community property (or derived from community property) in which both spouses have an interest. In these states there have been relatively few reported cases (although the number has been increasing in recent years); the decisions to date show no consistent pattern and the increasing importance of the questions posed suggests the desirability of uniform legislation to minimize potential litigation and to facilitate the planning of estates.

This act has a very limited scope. If enacted by a common law state, it will only define the dispositive rights, at death, of a married person as to his interests at death in property "subject to the Act" and is limited to real property, located in the enacting state, and personal property of a person domiciled in the enacting state. The purpose of the Act is to preserve the rights of each spouse in property which was community property prior to change of domicile, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their "community" rights. It thus follows the typical pattern of community property which permits the deceased

spouse to dispose of "his half" of the community property, while confirming the title of the surviving spouse in "her half."

It is intended to have no effect on the rights of creditors who became such before the death of a spouse; neither does it affect the rights of spouses or other persons prior to the death of a spouse. While problems may arise prior to the death of a spouse they are believed to be of relatively less importance than the delineation of dispositive rights (and the correlative effect on planning of estates). The prescription of uniform treatment in other contexts poses somewhat greater difficulties; thus this Act is designed solely to cover dispositive rights at death, as an initial step.

The key operative section of the Act is Section 3 (A.C.A. § 28-12-103) which sets forth the dispositive rights in that property defined in Section 1 (A.C.A. § 28-12-101), which is subject to the Act. Section 2 (A.C.A. § 28-12-102) follows Section 1's (A.C.A. § 28-12-101) definition of covered property and is designed to provide aid, through a limited number of rebuttable presumptions, in determining whether property is subject to the Act.

No negative implications were intended to be raised by lack of inclusion of other presumptions in Section 2 (A.C.A. § 28-12-102); areas not covered were simply left to the normal process of ascertainment of rights in property.

The first three sections form the heart of the Act; the succeeding sections might almost be described as precatory and have been added to clarify situations which would probably follow from the first three sections but which might raise questions. Thus, Section 8 (A.C.A. § 28-12-108) makes it clear that nothing in the Act prevents the spouses from severing any interest in community property or creating any other form of ownership of property during their joint lives; and, such action on their part will effectively remove

any property from classification as property subject to this Act. Similarly, Section 9 (A.C.A. § 28-12-109) makes it clear that the Act confers no rights upon a spouse where, by virtue of the property interests existing during the joint lives of the spouses, that spouse had no right to dispose of such property at death. By way of illustration, in at least one community property jurisdiction, the wife has no right to dispose of any part of the community property if she predeceases her husband. If the law of that jurisdiction is construed so as to treat this as a rule of property, then the move to the common law state

should not alter the "property interest" of the spouses by conferring a right on the wife which she did not previously possess. On the other hand, if the provision is treated as simply establishing a pattern of dispositive rights on death of a wife who predeceases her husband, rather than a property right, the common law state of new domicile could prescribe an alternative pattern of dispositive rights. The Act does not resolve this question; rather it simply makes clear that it does not affect existing "property rights," leaving to the courts the interpretation of the effect of the community property state's law.

Comment to Section 1 (A.C.A. § 28-12-101)

This section defines property subject to the Act.

Subsection (1) (A.C.A. § 28-12-101(1)): Personal Property

Subsection (1) (A.C.A. § 28-12-101(1)) is designed to cover all personal property which was acquired while the spouses were domiciled in a community property state, to the extent that it would have been treated as community property by that state at the time of acquisition and that no further action terminated the community character of the property. It also includes any property which was not originally community property but became such by agreement and, further, brings within the Act any personal property which can be traced back to a community source. Again the Act applies only if there was no severance of the community interests [Section 8 (A.C.A. § 28-12-108)]. [While Section 3 (A.C.A. § 28-12-103) applies to the dispositive rights of persons domiciled in the enacting state, the Act, as a practical matter, may be effective as to property located outside the state only to the extent that the state of

the situs of the property is willing to recognize the policy of the domiciliary state.]

Example 1. H and W, while domiciled in California, purchased 100 shares each of A Co., B Co. and C Co. stock with community property (earnings of H). H and W were transferred to a common law state which had not enacted this Act; while domiciled there H sold the 100 shares of A stock and with the proceeds purchased 100 shares of D stock. Subsequently H and W became domiciled in Michigan which had enacted this Act; H sold the B stock and 50 shares of D Co. stock and 150 shares of E Co. stock. H died domiciled in Michigan with 100 shares of C Co., 50 shares of D Co., and 150 shares of E Co. stock; all of the stock had always been registered in H's name. All of the shares, traceable to community property or the proceeds therefrom, constituted property subject to this Act.

Subsection (2) (A.C.A. § 28-12-101(2)): Real Property

Subsection (2) (A.C.A. § 28-12-101(2)) deals with real property and is confined to real property located within the enacting state (since presumably the law of the situs of the property will govern property rights). The policy and operation of this subsection are intended to be the same as

those set forth in subsection (1) (A.C.A. § 28-12-101(1)).

Example 2. H and W, while domiciled in California, purchased a residence in California. They retained the residence in California when they were transferred to Wisconsin. After becoming domiciled in

Wisconsin they used community funds, drawn from a bank account in California, to purchase a Wisconsin cottage. H and W subsequently became domiciled in Michigan; they then purchased a condominium in Michigan for \$20,000 using \$15,000 of community property funds drawn from their bank account in California and \$5,000 earned by H after the move to Michigan. H died domiciled in Michigan;

title to all of the real property was in H's name. Assuming Michigan had enacted this Act, three-fourths of the Michigan condominium would be property subject to this Act; the Michigan statute would not, however, apply to either the Wisconsin or California real estate. If Wisconsin had enacted this Act, the Wisconsin statute would apply to the Wisconsin cottage.

**Subsection (1) (A.C.A. § 28-12-101(1)) and (2) (A.C.A. § 28-12-101(2)):
Apportionment**

In both subsections (1) (A.C.A. § 28-12-101(1)) and (2) (A.C.A. § 28-12-101(2)) an apportionment is required by the phrase "all or the proportionate part" where personal property, or real property situated in the enacting state, has been acquired partly with property described as subject to the Act and partly with other (separate) property. To put it succinctly, the phrase represents a condensation of an area covered by many pages in a prior draft and is simply a statement of policy; it leaves to the courts the difficult task of working out the precise interest which will be treated as the "proportionate part" of the property subject to the dispositive formula of Section 3 (A.C.A. § 28-12-103). Simply by way of illustration, assume that a single man (domiciled in a community property state) purchased a life insurance policy with a face amount of \$100,000 and an annual premium of \$1,000. Assume further that he paid three premiums and then entered into marriage. Further assume that the next seven premiums were paid with his earnings while domiciled in the community property state and that he and his wife then moved to a common law state where the next ten premiums were paid from his earnings in that common law state; he then died after the payment of the twenty premiums. Under one interpretation of the law of Texas the contract would remain the separate property of the insured; the community would have a

claim for community funds advanced to pay premiums and, ignoring interest, it would appear that \$7,000 of the proceeds would be treated as community property and the remaining \$93,000 would be treated as the separate property of the deceased spouse. On the other hand, a state like California would probably treat the proceeds as being 65% separate and 35% community (basing the allocation of proceeds upon the percentage of separate and community funds contributed). Further variations could be mentioned. The illustration is one of the simpler problems. Much more difficult problems are encountered where benefits under a qualified pension and profit-sharing plan are involved and the employee has been domiciled in both community property and common law jurisdictions during the period in which benefits have accrued. Attempts at defining the various types of situations which could arise and the varying approaches which could be taken, depending upon the state, suggest that the matter simply be left to court decision as to what portion would, under applicable choice of law rules, be treated as community property. The principle suggested is that at least a portion should be treated as community, if the appropriate law so treated it. Ordinarily, such questions should not arise if the problem is foreseen and effective planning takes place prior to death of a spouse.

Comment to Section 2 (A.C.A. § 28-12-102)

The purposes of the rebuttable presumptions are simply to assist a court in applying the definitions in Section 1

(A.C.A. § 28-12-101), through a process of tracing the property to a community property origin.

Subsection (1) (A.C.A. § 28-12-102(1))

Subsection (1) of Section 2 (A.C.A. § 28-12-102(1)) deals with property acquired by the spouses while domiciled in a community property state. It thus provides that if one of the spouses acquired property while so domiciled, such property is "presumed" (a rebuttable presumption) to have been and remained community. It may be shown, of course, that such property was the separate property of the spouse and the law of the state of domicile may furnish the rule. For example, the law of community domicile may provide the rule that property acquired in the name of the wife shall be deemed to be her separate property or that a particular subsequent act effectively severed the community property interests.

Example 1. H, married to W and domiciled in California, acquired stock; later H and W became domiciled in Michigan. Such property, if retained, is presumed to be property subject to this Act. By operation of Section 1 (A.C.A. § 28-12-101) the proceeds of sale or exchange of such stock,

and property acquired with the proceeds or income of such stock, would be deemed subject to the Act. If, however, upon the death of H, H's personal representative rebutted the presumption by evidence that the stock was acquired by H with his separate property (or by inheritance) neither the stock nor property acquired with that property or the income therefrom (unless the income itself would be subject to the Act because, under the applicable law, income from separate property is deemed to be community property) would be subject to this Act. Similarly the presumption may be rebutted by showing that such property, though originally community property, was effectively severed by an act of the spouses. It should be emphasized that the presumption is simply one of procedural convenience and neither changes the nature of the property interests nor prevents an interested person from showing the separate nature of the property.

Subsection (2) (A.C.A. § 28-12-102(2))

Subsection (2) (A.C.A. § 28-12-102(2)) sets up a rebuttable presumption that where a domiciliary of a common law state acquired property in such form as to indicate that title was in joint tenancy, tenancy by the entireties, or some other form of joint ownership with right of survivorship, it will be presumed that the property is not subject to the Act. This presumption was deemed appropriate as expressing the normal expectations of the spouses and to facilitate ascertainment of title to real property located in the enacting state, as

well as personal property wherever located.

Example 2. John and Mary Jones, formerly domiciled in California, became domiciled in Illinois and purchased a residence, taking title in the names of "John and Mary Jones as joint tenants, and not as tenants in common, with right of survivorship." Regardless of the source of the funds, the Illinois residence would be presumed to be held in joint tenancy and not subject to this Act.

Comment to Section 3 (A.C.A. § 28-12-103)

This section deals with the dispositive rights, at death, of (1) a married person domiciled in the enacting state as to personal property and (2) of any married person, including a nondomiciliary of the

enacting state, as to real property located in the enacting state; it also sets forth rules for intestate succession to property subject to this Act.

Testate Disposition

The dispositive pattern is the usual one encountered in the community property states; the deceased spouse may dispose of his one-half of the community property, subject to the provisions of Section 9 (A.C.A. § 28-12-109).

Example. H and W were formerly domiciled in California and are now domiciled in Michigan. All of their property was community property prior to the move from California to Michigan. At H's death he held title to a home in Michigan which had been purchased with the proceeds of the sale of a home in California which had been community property. Stock acquired as community property in California was held in his name in safety deposit boxes

located in Illinois and Michigan. H and W had acquired a cottage in California as community property, held in H's name, and it was so held at the time of his death. H and W acquired a Michigan resort condominium, taking title as tenants by the entirety. H acquired bonds issued by his employer with earnings in Michigan and held title in his own name. The Michigan residence and the stock would be deemed property subject to this Act and H would have the right under Section 3 (A.C.A. § 28-12-103) to dispose of half of that property by his will. The remaining property would not be deemed subject to this Act.

Intestate Succession

If the property subject to this Act passes by intestate succession, the law of the enacting state applies to the decedent's one-half, again subject to Section 9 (A.C.A. § 28-12-109). If under the law of the enacting state, a surviving spouse is entitled to one-third of the decedent's property by intestate succession, the result of the Act is to give to her two-thirds of the property subject to the Act. For example, if the spouses had recently moved to a common law state and owned \$300,000 of property (all being personal property held in the husband's name and acquired as community property), the wife

would be entitled to one-half of the property (\$150,000) and would receive a 1/3 share of the husband's half (\$50,000) for a total of \$200,000. It is clearly within the power of the enacting state to prescribe any pattern of intestate succession deemed appropriate, and views may differ. In some community property states, the surviving spouse receives all of the decedent's community property upon intestate succession; in another, she would receive none. Similarly, the common law state may alter the pattern to fit its own policy determination.

Dower, Curtesy, Elective Share

Dower and curtesy do not exist in community property and have been abolished in many common law states; policy considerations suggest that no such interest should exist in property subject to this Act, since the surviving spouse already

has a one-half interest in such property. Similar reasons suggest a denial of any right in the surviving spouse to elect a statutory share in the one-half of the property over which the decedent had a power of disposition.

Comment to Section 4 (A.C.A. § 28-12-104)

This section simply provides for perfection of title interests of the surviving spouse (e.g. where title was in the name of the deceased spouse) by orders of the court of appropriate jurisdiction (e.g. the probate court) in the enacting state. This section is designed to eliminate any liability of the personal representative for a

breach of his fiduciary duty by failing to search for or to discover whether property held by the decedent is property defined in Section 1 (A.C.A. § 28-12-101), unless a written demand is made by the surviving spouse or the spouse's successor in interest. In several states the Court administering a decedent's estate has a duty or

undertakes to advise parties in interest of their legal and equitable rights, and this section is similarly designed to eliminate such Court's liability for failing to discover the community rights and to advise the interested party of his rights. Nothing

contained in this section is to be construed to interfere with the Court's jurisdiction in a proper proceeding to perfect the title of the surviving spouse in and to property to which this Act applies.

Comment to Section 5 (A.C.A. § 28-12-105)

This section is a corollary to Section 4 (A.C.A. § 28-12-104). Since title is apparently in the surviving spouse, the section simply provides for an action by the personal representative, heirs, or devisees and is again designed to eliminate any liability of the personal representative for

a breach of his fiduciary duty by failing to discover or to attempt to discover whether property held by the surviving spouse is property subject to this Act, absent a written demand by an heir, devisee or creditor of the decedent.

Comment to Section 6 (A.C.A. § 28-12-106)

This section is designed to protect purchasers and lenders taking a security interest, who acquire such interest for value, after the death of the decedent, from a person who appears to have title to property to which this Act applies. The only requirement is that the purchaser or lender have acquired his interest for value; there is no requirement of good faith absence of notice. The purpose of the section is to permit reliance upon apparent title and facilitate both ascertainment

of title and disposition of assets where adequate consideration is paid. Since, during the joint lives of the spouses, the spouse with apparent title would have been able to convey title (at least as to community property) though being held accountable to the other spouse for an appropriate allocation of the proceeds or any breach of fiduciary obligation, the Act simply extends this treatment to disposition of the assets after the death of a spouse.

Comment to Section 8 (A.C.A. § 28-12-108)

The rights, and procedures, with respect to severance of community property vary markedly among the community property states. The Act simply makes

clear that nothing in the Act itself in any way limits the rights of the spouses to sever community property or to create a form of ownership not subject to this Act.

UNIFORM TOD SECURITY REGISTRATION ACT — 1989 ACT

(A.C.A. § 28-14-101 et seq.)

Prefatory Note

This Act (chapter) is a free-standing version of Part 3 of Article VI of the Uniform Probate Code, as adopted by the National Conference of Commissioners on Uniform State Laws in 1989. The purpose of the Act (chapter) is to allow the owner of securities to register the title in transfer-on-death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered. The legislation (chapter) enables an issuer, transfer agent, broker or other such intermediary to transfer the securities directly to the designated transferee on the owner's death. Thus, TOD registration achieves for securities a certain parity with existing TOD and pay-on-death (POD) facilities for bank deposits and other assets passing at death outside the probate process.

The TOD registration under this Act (chapter) is designed to give the owner of securities who wishes to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co-owners cooperate. Difficulties arise when co-owners fall into disagreement, or when one becomes afflicted or insolvent.

Use of the TOD registration form encouraged by this legislation (chapter) has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred, or whenever the owner otherwise complies with the issuer's conditions for changing the title form of the investment. The Act (chapter) recognizes, in Section 2 (§ 28-14-102), that co-owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the

beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of the Act (chapter) is wholly optional with issuers. The drafting committee received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that the Act (chapter) takes full account of the practical requirements for efficient transfer within the securities industry.

Section 3 (§ 28-14-103) invites application of the legislation (chapter) to locally owned securities though the statute (chapter) may not have been locally enacted, so long as the Act (chapter) is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions in which securities issuers and transfer agents are sited enact the measure (chapter), its benefits will become generally available to persons domiciled in states that do not at once enact the statute (chapter).

The legislation has been drafted as a separate Act (chapter), hence not interpolated as an expansion of the former UPC Article VI, Part 1, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities. By virtue either of statute or of account terms (contract), multiple-party bank accounts allow any one cotenant to consume or transfer account balances. See R. Brown, *The Law of Personal Property* § 65, at 217 (2d ed. 1955); Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv.L.Rev. 1108, 1112 (1984). The rule for securities, however, has been the rule that applies to real property: all cotenants must act together in transferring the securities. This difference in the legal regime reflects differences in func-

tion among the types of assets. Multiple-party bank accounts typically arise as convenience accounts, to facilitate frequent small transactions, often on an agency basis (as when spouses or relatives share an account). Securities resemble real estate in that the values are typically large and the transactions relatively infrequent, which is why the legal regime requires the concurrence of all concurrent owners for transfers affecting such assets.

Recently, of course, this distinction between bank accounts and securities has begun to crumble. Banks are offering certificates of deposit of large value under the same account forms that were devised for low-value convenience accounts. Meanwhile, brokerage houses with their so-called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. In the latest developments, even the line between real estate and bank accounts is becoming indistinct, as the "home equity line of credit" creates a check-writing conduit to real estate values.

Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules. True co-owners of securities, like owners of realty, should act together in transferring the asset.

The joint bank account and the Totten trust originated in ambiguous lifetime ownership forms, which required former UPC § 6-103 or comparable state legislation to clarify that an inter vivos transfer was not intended. In the securities field, by contrast, we start with unambiguous lifetime ownership rules. The sole purpose of the present statute (chapter) is to facilitate a nonprobate TOD mechanism as an option for those owners.

For a comprehensive discussion of the issues entailed in this legislation (chapter), see Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga.L.Rev. 789 (1987).

Comment to Section 1 (A.C.A. § 28-14-101)

"Security" is defined as provided in UCC § 8-102 (§ 4-8-102) and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

"Survive" is not defined. No effort is made in this Act (chapter) to define survival as it is for purposes of intestate succession in UPC 2-104 which requires survival by an heir of the ancestor for 120 hours. For purposes of this Act (chapter),

survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

The definitions of "devisee", "heirs", "person", "personal representative", "property", and "state" are taken from sec. 1-201 of the Uniform Probate Code which, as revised in 1989, includes this Act (chapter) as Part 3 of Article VI.

Comment to Section 2 (A.C.A. § 28-14-102)

This section (§ 28-14-102) is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners hold-

ing in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holdings into separate registrations of the

number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term “individuals,” as used in the section (§ 28-14-102), limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section (§ 28-14-102) does not restrict individuals using

this ownership form as to their choice of death beneficiary. The definition of “beneficiary form” in Section 1 (§ 28-14-101) indicates that any “person” may be designated beneficiary in a registration in beneficiary form. “Person” is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

Comment to Section 3 (A.C.A. § 28-14-103)

This section (§ 28-14-103) encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this (chapter) or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act (chapter) in X Company’s state of incorporation, or in the state of incorporation of X Company’s transfer agent. Or, an enactment by the state of the issuer’s principal office, the

transfer agent’s principal office, or of the issuer’s office making the registration also would validate the registration. An enactment of the state of the registering owner’s address at time of registration also might be used for validation purposes.

The last sentence of this section (§ 28-14-103) is designed, as is UPC 6-101 (Rev.1989), to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this Act (chapter).

Comment to Section 4 (A.C.A. § 28-14-104)

As noted above in commentary to Section 2 (§ 28-14-102), this Act (chapter) places no restriction on who may be des-

ignated beneficiary in a registration in beneficiary form.

Comment to Section 5 (A.C.A. § 28-14-105)

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner’s death so that the

sums realized may be “paid” to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid non-probate death benefit or transfer on death.

Comment to Section 6 (A.C.A. § 28-14-106)

This section (§ 28-14-106) simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section (§ 28-14-106) says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity’s

terms and conditions, if any, may be relevant. See Section 10 (§ 28-14-110). If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

Comment to Section 7 (A.C.A. § 28-14-107)

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 8 (§ 28-14-108) deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; section 10 (§ 28-14-110) enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TODA (20%), B (30%), C (50%)," would be improper. Though not included in the

beneficiary forms described for illustrative purposes in Section 10 (§ 28-14-110), the Act (chapter) enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a non-probate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or re-register the security as directed by the decedent's personal representative.

See the Comment to Section 1 (§ 28-14-101) regarding the meaning of "survive" for purposes of this Act (chapter).

Comment to Section 8 (A.C.A. § 28-14-108)

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. The Act (chapter) does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subsection (c) (§ 28-14-108(c)) would qualify as a notice under UCC § 8-403 (§ 4-8-403).

"Good faith" as used in this section (§ 28-14-108) is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in

the trade," as specified in UCC § 2-103(1)(b) (§ 4-2-103(1)(b)).

The protections described in this section (§ 28-14-108) are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code (§ 4-1-101 et seq.). Because persons interested in this Act (chapter) may wish to be reminded of relevant UCC (§ 4-1-101 et seq.) provisions, a brief summary follows.

"UCC § 8-403 (§ 4-8-403), 'Issuer's Duty as to Adverse Claims' contains detailed provisions regarding duties of inquiry by an issuer of a certificated or

uncertificated security who is requested to effect a transfer, and the availability and use of 30 day notices to force adverse claimants to start litigation if further delay in transfer is desired. UCC § 8-201's (§ 4-8-201) definition of 'issuer' for purposes of 'registration of transfer...' is simply 'a person on whose behalf transfer books are maintained'. UCC § 8-403 (§ 4-8-403) is among the sections dealing with registration of transfers.

"UCC §§ 8-308 and 8-404(1) (§§ 4-8-308 and 4-8-404(1)) appear to exonerate an issuer who acts in response to transfer directions signalled by the 'necessary indorsement' on or with a certificated security or in response to 'an instruction originated by an appropriate person' in the case of an uncertificated security. Section 8-308 (§ 4-8-308) describes the meaning of 'appropriate person' in the case of a certificated security as 'the person specified by the certificated security... to be entitled to the security.' UCC § 8-308(6) (§ 4-8-308(6)) (1978). In the case of an uncertificated security, 'appropriate person' means the 'registered owner.' *Id.* § 8-308(7) (§ 4-8-308(7)). The survivor of owners listed as joint tenants with right of survivorship is specifically defined as an authorized person. *Id.* § 8-308(8) (d) (§ 4-8-308(8)(d)). The UCC (§ 4-1-101 et seq.) aspect of the problem could be met by an additional sub-paragraph to § 8-308(8) (§ 4-8-308(8)) that would include a TOD beneficiary as an 'appropriate person' when the beneficiary has survived the owner.

"No UCC (§ 4-1-101 et seq.) addition would be necessary if a TOD beneficiary

designation were viewed as a contingent order for transfer at the owner's death that may be safely implemented as a direction from the owner as an 'authorized person.' The owner's death before completion of the transfer would not pose UCC (§ 4-1-101 et seq.) problems because § 8-308(10) (§ 4-8-308(10)) provides: 'Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this Article (chapter) by virtue of any subsequent change of circumstances.'

"It might be questioned whether a TOD direction, which may be revoked before it is carried into effect and is also contingent on the beneficiary's survival of the registrant, is within the transfer directions contemplated by the UCC (§ 4-1-101 et seq.) framers for purposes of issuer protection. However, since § 8-202 (§ 4-8-202) explicitly protects issuers against problems arising because of restrictions or conditions on transfers, only the novelty of revocable directions for transfer on death gives pause.

"In general, Article 8 of the UCC (§ 4-8-101 et seq.) reflects a careful attempt to protect implementation of a wide range of transfer instructions so long as the signatures are genuine and are those of owners acting in conformity with duly imposed rules of the issuer organization.... Hence, existing UCC (§ 4-1-101 et seq.) protections should be adequate,..." Wellman, *Transfer-On-Death Securities Registration; A New Title Form*, 21 Ga.L.Rev. 789, 823 n. 90 (1987).

Comment to Section 9 (A.C.A. § 28-14-109)

Subsection (a) (§ 28-14-109(a)) is comparable to UPC § 6-214 (Rev.1989). Subsection (b) (§ 28-14-109(b)) is similar to UPC § 6-101(b) (Rev.1989).

Consideration should be given to the

desirability of adapting the section as necessary to fit local principles regarding the rights of a surviving spouse to protection against disinheritance by non-probate transfers effective at death.

Comment to Section 10 (A.C.A. § 28-14-110)

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under the Act (chapter) and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; i.e. that of

"and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intes-

tate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 7 (§ 28-14-107).

UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

(§ 28-27-101 ET SEQ.)

Prefatory Note

The Uniform Testamentary Additions to Trusts Act deals with what is commonly known as the "Pour-Over Trust" problem. A pour-over trust is one where a will provides that a part of the estate shall go to an already existing trust, thus avoiding the necessity of repeating in the will all the terms of the trust. Obviously this is a great convenience to the draftsman because some trusts are very long and involved. The pour-over trust has the further advantage that a large part of the estate thus transferred to a trust is not thereafter involved in probate court proceedings.

One problem sought to be remedied arises from the doubt that exists as to whether the pour-over provisions are valid in view of the general requirement that a will be wholly in writing and signed in the presence of witnesses. In most cases the existing trust is not so witnessed.

The uniform act permits the pour-over of property by the will into a trust, the terms of which are set forth in a legally effective written instrument identified in the will, even though the trust may not have come into being by delivery of the corpus to the trustee.

Other serious problems arise if the trust which existed at the time the will was executed is thereafter amended or revoked.

The uniform act permits the pour-over of property by the will into an existing

trust, even though the trust is one which can be amended or revoked. However, it carefully spells out the effect of an amendment or revocation of the trust, always reserving to the testator the right to provide otherwise in his will. The objective is to give the testator the maximum latitude in disposing of his estate. Although it may be an unusual situation in which the testator desires to permit amendments to the trust made after his death to govern the disposition of his estate, the uniform act recognizes that such situations may arise and permits the testator to so provide.

The uniform act will remove uncertainty in those states in which the law is unsettled. The rights of parties as they existed at the time of the passage of the act are not to be affected by the act, and a devise or bequest under a will executed prior to the effective date of the uniform act will be governed as to validity and effect by the law in effect prior to that effective date, whether it proves to have been the same as or different from the law established by the uniform act.

Although some states have adopted laws on this subject, they differ in many particulars. Since persons often have property in several states, it is desirable that the law in the several states be uniform, so that one who plans an estate can be certain that a will valid in one state will be valid in all states.

UNIFORM VETERANS' GUARDIANSHIP ACT (§ 28-66-101 ET SEQ.)

Prefatory Note

Existing Federal legislation provides for various benefits to disabled veterans of the military and naval forces of the United States. These vary in nature and extent under varying circumstances and in some respects depending upon the type and period of service.

Among benefits mentioned are periodical payments. These are denominated compensation, pension, insurance, etc.

Certain beneficiaries are mentally incompetent. Others are minors.

The Administrative Agency which administers these laws is the "Veterans Administration" (38 United States Code, Section 11).

The Executive Head of that Agency is a statutory officer of the United States called the Administrator of Veterans Affairs.

Section 450 of Title 38, U.S. Code requires the Veterans Administration to function in a manner somewhat analogous to that of a guardian ad litem on behalf of mentally incompetent and minor beneficiaries of the various Federal Acts administered by the Veterans Administration. Attorneys employed by the Veterans Administration in its offices in the several States appear in the appropriate courts of those States for the purpose of carrying out the national policy indicated. It was early found that better service could be rendered and more economically if less variety in the law and in the practice were encountered and if somewhat more effective and expeditious control could be exercised by the respective State Courts in connection with the functioning of the guardians, appointed by them. At present about 80,000 beneficiaries of the Veterans Administration are under guardianship. About one-half are mentally incompetent and one-half are minors. In 1928 the total beneficiaries under guardianship was about 52,000.

The Uniform Veterans' Guardianship Act was adopted by the National Conference of Commissioners on Uniform State Laws at the Meeting in Seattle, Washing-

ton, in 1928. Within a relatively short time thereafter it was adopted literally or in its essential parts in 35 states, Puerto Rico and the Philippine Islands. Certain essential portions of the Act dealing principally with notice to the Veterans Bureau and Commitment to Veterans Hospitals were enacted in 11 States. In two additional States the necessary amendments were made to existing General Statutes to accomplish the purpose desired with respect to accountings, notices and commitments, but no part of the Uniform Act as such was engaged in those States nor in Hawaii.

Experience, in the light especially of changed and changing conditions, has indicated the desirability of certain amendments. In some States certain of these amendments have already been enacted although the language is not precisely the same as in the presently recommended redraft.

The subject matter of the more important changes or clarifications in the proposed Bill may be summarized as follows:

(1) The Administrator of Veterans Affairs is the present title of the Executive Head of the Veterans Administration. The Veterans Administration is the administrative agency of the United States Government dealing with all pension and allied matters pertaining to veterans. It is the legal successor to the Veterans Bureau, the Pension Bureau and National Homes for Disabled Volunteer Soldiers. The original Guardianship Act did not specifically provide that the Administrator (then called the Director) should be a party in interest in proceedings in the various Probate Courts dealing with guardianship of veterans. It was supposed that this would be recognized without any statutory provision. This supposition was borne out in several States when it was necessary to litigate the question to the Appellate Courts. *Hines v. Hook* (Mo.) 89 S.W. (2d) 52. *Hines v. McCoy* (Miss.) 159 So. 306. *Copsey's Guardianship* (Calif.) 60 Pac. (2d) 121. *Veterans Bureau v. Thomas*

(Va.) 159 S.E. 159. *Hines v. Paregol* (D.C.) 77 Fed. (2d) 953. It seems desirable to settle this question permanently and avoid the delay and expense incident to its recurrence in the trial court with the possibility of appeals. The recommended redraft of the Act provides that the Administrator of Veterans Affairs shall be a party in interest in proceedings pertaining to the guardianship or the removal of disability of a beneficiary of the Veterans Administration. The substance of this has been enacted in 8 States.

(2) Because of variation in practice and to avoid possible misunderstandings and also the necessity for motions to reconsider and afford the Veterans Administration attorneys a fair opportunity to examine into proposed actions before orders are entered, the attached redraft uses language which makes it entirely clear that notice must be given to the Veterans Administration before any action is taken in guardianship matters in which it is interested. The present language, in some States at least, has been construed as inapplicable to certain types of procedure, e.g., a proceeding to remove the disability of a minor preliminary to the guardian making a final settlement with the minor; and applications for authority to invest funds. The substance, but not the exact language, as to notice has been adopted in several States.

(3) Section 9 (A.C.A. § 28-66-109) is designed to require some justification as to personal sureties tendered and to make it entirely clear that notwithstanding such justification the court may in its discretion require corporate surety on a guardian's bond. Extended discussion of this is unnecessary as everyone will recognize the practical necessity for such provision.

(4) Following the lead of some States as to requiring physical check of assets shown by the accounting to be in the guardian's possession, Section 10 (A.C.A. § 28-66-110) has been changed to specifically require physical check of the assets alleged to be on hand. It provides several alternative methods having in mind convenience, safety of the assets and saving in expense. In substance this requirement has been enacted in 7 States. The alternative drafts of Section 10 involve chiefly different dates for filing accounts.

(5) Section 13 (A.C.A. § 28-66-113) has

been changed so as to require investment of any surplus funds in the same types of securities required of guardians of non-veterans under existing laws of the particular jurisdiction; except that there is specific statutory authorization provided for "direct unconditional interest bearing obligations of this State or of the United States" and in obligations unconditionally guaranteed by the United States Government. With the exception of the investments just mentioned all investments are required to be first approved by an order of the court. This is required under the laws of several States at present. Section 15 (A.C.A. § 28-66-115) specifically authorizes the purchase of the entire fee simple title to real estate under certain circumstances, as a home for the ward or for his dependent family. Specific safeguards are prescribed.

(6) The only remaining substantial change deals with commitment to Federal Hospital or similar institutions. The language of the original Act on this point dealt with veterans of a "War." The same problems exist with respect to peace-time veterans as war-time veterans and there is no logical reason apparent for following one procedure to commit a peace-time veteran to a Federal Hospital and a different procedure to commit a war-time veteran. Section 18 (A.C.A. § 28-66-118) of the proposed redraft is so phrased as to authorize the commitment after proper adjudication of the mental status of any person entitled to care in a Federal institution.

Because of the necessity for transfer from one institution to another depending upon the type of affliction and availability of treatment therefor, and because of possible lack of sufficient facilities in a given area it is believed advisable to authorize the commitment to the "Veterans Administration or other agency of the United States Government" instead of to a specifically named hospital. It will be understood that the Veterans Administration operates numerous hospitals in various parts of the Nation and also that other Departments of the Federal Government operate hospitals (e.g., Public Health Service, War Department, Navy Department). Appropriate provision is also made in Section 18 (A.C.A. § 28-66-118) for transfer of eligible patients from State to Federal institutions with certain restric-

tions in the event that the individual shall have been charged with a criminal offense.

Section 18 (A.C.A. § 28-66-118) also provides that an order of commitment by a court of competent jurisdiction of another State committing a patient to the Veterans Administration or other Federal agency "shall have the same force and effect as to such person while in this State as in the State in which is situated the court entering such ... order." This is necessary or at least desirable in order to take care of transfers between hospitals in different States and avoid the detrimental effect on the patient of new commitment proceedings in the second State and the expense incident thereto. This provision has also been enacted in several States and it will readily be seen that if enacted generally it will greatly facilitate the

proper hospitalization of veterans in appropriate institutions according to the type of their affliction.

The foregoing covers the essential substantive changes. Various changes have been made in the language of a number of Sections, but these changes are for purposes of clarification and in the interest of brevity and do not change the substance in material respects.

Explanatory notes appear as to each Section. They are printed immediately following the Section except that the Note on Section 10 (A.C.A. § 28-66-110) is printed between the draft of that section which will be appropriate for most States and the alternative draft thereof which is suitable in certain other States which do not in non-veteran cases require annual reports to the court.

Comment to Section 1 (A.C.A. § 28-66-101)

This Section contains definitions only. They are the same as in the original Act, except the definitions of "estate" and "income" are clarified and stated in separate sentences. The Administrative Agency of the Federal Government which now has jurisdiction of compensation, pension and insurance matters pertaining to former members of the Military and Naval forces is the "Veterans Administration." Its functions include those of the former Veterans

Bureau, The Bureau of Pensions, etc. They relate to all veterans of all wars, including the present war and also to peace-time veterans and to the dependents of all veterans. The statutory executive head of the Veterans Administration is the "Administrator of Veterans Affairs." Some of the language in this Act was chosen to conform to the terms used by the Veterans Administration.

Comment to Section 2 (A.C.A. § 28-66-102)

The original Act did not in terms provide that the Administrator (then called the Director) should be a party in interest in proceedings dealing with guardianship of veterans. In a few cases the issue was raised and it was held he was a proper party:

Hines v. Hook, 89 S.W. (2d) (Mo.) 52.
In re Copsey's Guardianship, 60 Pac.
(2d) (Calif.) 121.

Hines v. McCoy, 159 So. (Miss.) 306.
To avoid possible future litigation and make the practice uniform the present Act provides that the Administrator of Veterans Affairs shall be a party in all guardianship proceedings and other proceedings incident thereto.

Comment to Section 3 (A.C.A. § 28-66-103)

See Section 5 (A.C.A. § 28-66-105).

Comment to Section 4 (A.C.A. § 28-66-104)

The substance of this section is the same as Section 3 of the original Act. The language has been changed in the interest of clarity and brevity.

Comment to Section 5 (A.C.A. § 28-66-105)

This is essentially the same as Section 4 of the original Act, but more specifically sets forth the information required in the petition for appointment of a guardian.

Comment to Section 6 (A.C.A. § 28-66-106)

This is the same as Section 5 of the original Act. It obviates the necessity of otherwise proving minority and necessity for a guardian if certificate from Veterans Administration is presented.

Comment to Section 7 (A.C.A. § 28-66-107)

This is the same as Section 6 of the original Act except for a slight change in language. It provides in substance that a certificate from the Veterans Administration that certain money is payable and that the Veterans Administration in accordance with its procedure has determined that the person beneficially entitled is incompetent, shall be prima facie evidence of the necessity for the appointment of a guardian.

Comment to Section 8 (A.C.A. § 28-66-108)

This Section expressly requires notice to the ward, and to any others as may be required by the general laws of the enacting State and also to the Veterans Administration. It states certain requirements implied under Section 7 of the original Act.

Comment to Section 9 (A.C.A. § 28-66-109)

This Section requires bond to be approved by the Court, the form and condition thereof to be the same required in other guardianship cases. Generally, it also requires affidavit of justification in the case of personal sureties. Although the court's power is inherent the Section adds an express authorization for the court in its discretion to require corporate surety, premium to be paid from the estate. This Section is substantially the same as Section 8 of the original Act. The language has been slightly changed to clarify, and the first sentence deleted as surplusage. No requirement as to inventory is included in this Act. This is because it does not purport to deal with all of the detailed procedure of the administration by the court in guardianship cases but only with certain vital phases. As to an inventory requirement and as well other miscellaneous requirements not specifically provided for in the Act, the law of the State applicable in non-veteran guardianship cases will govern since there is no conflict between it and the terms of this Act.

Comment to Section 10 (A.C.A. § 28-66-110)

Section 10 (A.C.A. § 28-66-110) provides certain changes from Section 9 of the original Act. It now contains a provision for an actual physical check, by one of several methods, of all moneys and securities held by the guardian at the time the account is rendered. An alternative Section 10 is submitted.

The alternative Section 10 presented is virtually the same except that it is suitable for jurisdictions where accountings are generally required every two or three

years; with this addition, that an interim account shall be filed annually with the Veterans Administration rather than with the court.

An additional requirement introduced in both drafts of Section 10 is that a copy of not only accounts, but also of any petition, motion or other pleading, whether such deals with accountings, must be supplied to the Veterans Administration. This is recommended because of experience in a number of jurisdictions where the effective act producing the loss to the ward

occurred in connection with some transactions other than an account, such as petition to invest funds, and it is too late to prevent the loss when the illegal transaction is discovered upon the filing of subsequent accounts.

The Section relates to all assets and income whether received directly by the accounting guardian, from the Veterans Administration or its predecessor or through a predecessor guardian. See also Sections 1 (A.C.A. § 28-66-101) and 23 (A.C.A. § 28-66-123).

Comment to Section 11 (A.C.A. § 28-66-111)

This Section authorizes the court in its discretion to remove a guardian who fails to file proper accounts or furnish the Veterans Administration with a true copy of any such account, or any other petition or pleading of a type to a copy of which the

Veterans Administration is entitled. It is substantially the same as Section 10 of the original Act, changed to conform to the changes heretofore mentioned in Section 10 (A.C.A. § 28-66-110) of the amended Act.

Comment to Section 12 (A.C.A. § 28-66-112)

The language has been clarified but Section 12 (A.C.A. § 28-66-112) is in substance the same as Section 11 of the original Act. This Section deals with compensation of guardians. It makes provision for

notice to the Veterans Administration where compensation is requested in excess of 5%. There is no change in the amount of compensation.

Comment to Section 13 (A.C.A. § 28-66-113)

This Section expressly requires investment of surplus funds. The investment in direct unconditional obligations of the United States or of the enacting State and in obligations unconditionally guaranteed by the United States as to principal and interest are permitted without a prior order of court. All other investments shall

be in accordance with the general law of the State and may be made only upon prior order of the court. This involves some change from Section 12 of the original Act and differs in some respects from presently existing law in a number of States. On this subject there are wide variations of State policy and of language.

Comment to Section 14 (A.C.A. § 28-66-114)

This Section is substantially the same as Section 13 of the original Act, but it specifically provides, in order to avoid controversies, that the guardian shall not apply any part of the income or estate for the maintenance of any person "other

than the ward, the spouse, and the minor children of the ward," without prior order of court pursuant to hearing, notice of which shall have been given the Veterans Administration as is now required.

Comment to Section 15 (A.C.A. § 28-66-115)

Section 15 (A.C.A. § 28-66-115) is new. Its purpose is to obviate controversies which occur from time to time as to whether the purchase of a home for the ward constitutes an investment, and if it does, a permissible investment for a guardian. In a substantial number of cases it has been found that because of the background, the size of the family and other circumstances, it seems desirable to acquire either a rural or urban home for the ward and his family, and sometimes

for the family when the ward is confined in a hospital. This section specifically authorizes the court to permit this after a proper notice and hearing, thus clearly making the matter discretionary with the court. The law of a number of States now permits this.

The other provisions are incorporated to permit protection of the ward's interests by the guardian in connection with foreclosure sales or partitions.

Comment to Section 16 (A.C.A. § 28-66-116)

This is the same as Section 14 of the original Act and authorizes custodians of

public records to provide copies thereof without charge.

Comment to Section 17 (A.C.A. § 28-66-117)

This is a new Section. There are varying statutory provisions for judicial restoration of one theretofore adjudged incompetent. To afford a simple and uniform optional method and to expedite the final accounting, and hence release of funds to the restored veteran, Section 17 (A.C.A. § 28-66-117) provides for final accounting

and delivery of assets and discharge of the guardian and his sureties by order of court predicated on certificate from the Veterans Administration that the incompetent has been rated competent by the Veterans Administration upon examination, or in the case of a minor that the minor has attained majority.

Comment to Section 18 (A.C.A. § 28-66-118)

This Section deals with commitment of incompetent beneficiaries of the Veterans Administration for care or treatment in Federal Institutions. It is based on Section 15 of the original act but clarifies and elaborates the provisions thereof. In substance it provides that upon a person being adjudged to be afflicted with insanity or some other mental condition by whatever name the particular statute designates it and to be subject to commitment to an institution the court may commit to the "Veterans Administration or other agency of the United States Government" upon receipt of a certificate therefrom that such person is eligible for care by the certifying agency. Upon the commitment being effectuated this Section confers upon the Chief Officer of any Federal Institution in which the patient may be cared for the same powers with respect to "retention, transfer, parole or discharge" as are possessed by superintendents of State Hospitals for mental diseases in the

enacting State. Authority is granted by the Section for transfers to Federal agencies as well as for original commitments thereto with a saving provision in case of so-called criminal insane which requires special procedure.

This Section also expressly makes effective within the enacting State an order of commitment by the court of another State which commits the patient under the conditions stated, to the Federal Agency. This is somewhat analogous to the Uniform Act recommended by the National Conference in 1921 (pages 297, 342, 359) pertaining to out of State service of process in certain circumstances. See also the Uniform Act proposed in 1931 to secure the attendance of out of State witnesses. 9 Uniform Laws Ann. 1933 Supp. 6. Reciprocal legislation has heretofore been enacted by various States on several subjects. It is somewhat akin to the interstate compacts. The Act of Congress approved June 6, 1934, 48 Stat. 909, 18 U.S. Code 420 was designed to

encourage interstate cooperation and followed many earlier similar Acts on a variety of subjects. 1 *Law and Contemporary Problems* (1933) page 460, 70 U.S. Law Rev. 574. 73 U.S. Law Rev. 86. *California Stats.* 1937, page 469 (Deering General Laws Section 5783). *Remington R.S.* Washington, 1940, Supp. Sec. 10249-11. *In re Jos. Tenner*, 20 A.C. (Cal.) 696. *Massachusetts v. Klaus*, 130 N.Y. Supp. 713. *Washington v. Oregon*, 214 U.S. 205.

These provisions will facilitate the placing of patients in appropriate Federal Institutions especially equipped to treat a particular type of mental trouble and save the patient distress and sometimes defi-

nite harm incident to a second adjudication experience in the State to which transferred. It will also save substantial expense to the various States, to the Federal Government, and to the patients.

The right to release by the Chief Officer or by judicial procedure is retained in the committing State, notwithstanding the patient may be confined in a Federal Institution in another State. This is an express statutory condition of the commitment.

The substance of Section 18 (A.C.A. § 28-66-118) has heretofore been enacted in several States and has proved satisfactory.

UNIFORM DURABLE POWER OF ATTORNEY ACT (§ 28-68-201 ET SEQ.)

Prefatory Note

The National Conference included Section 5-501 and 5-502 in Uniform Probate Code (1969) (1975) concerning powers of attorney to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.

The provisions included in the original UPC modify two principles that have controlled written powers of attorney. Section 5-501 (UPC (1969) (1975)), creating what has come to be known as a "durable power of attorney," permits a principal to create an agency in another that continues in spite of the principal's later loss of capacity to contract. The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency.

Section 5-502 (UPC (1969) (1975)) alters the common law rule that a principal's death ends the authority of his agents and voids all acts occurring thereafter including any done in complete ignorance of the death. The new view, applicable to durable and nondurable, written powers of attorney, validates post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death. The idea here was to encourage use of powers of attorney by removing a potential trap for agents in fact and third persons who decide to rely on a power at a time when they cannot be certain that the principal is then alive.

To the knowledge of the Joint Editorial Board for the Uniform Probate Code, the only statutes resembling the power of attorney sections of the UPC (1969) (1975) that had been enacted prior to the approval and promulgation of the Code were Sections 11-9.1 and 11-9.2 of the Code of Virginia [1950]. Since then, a variety of

UPC inspired statutes adjusting agency rules have been enacted in more than thirty states.

This [Act] [Section] originated in 1977 with a suggestion from within the National Conference that a new free-standing uniform act, designed to make powers of attorney more useful, would be welcome in many states. For states that have yet to adopt durable power legislation, this new National Conference product represents a respected, collective judgment, identifying the best of the ideas reflected in the recent flurry of new state laws on the subject; additional enactments of a new and improved uniform act should result. For other states that have acted already, this new act offers a reason to consider amendments, including elimination of restrictions that no longer appear necessary.

In the course of preparing this [Act] [Section], the Joint Editorial Board for the Uniform Probate Code, acting as a Special Committee on the new project, evolved what it considers to be improvements in §§ 5-501 and 5-502 of the 1969 and 1975 versions of the Code.* In the main, the changes reflect stylistic matters. However, the idea reflected in Section 3(a) (A.C.A. § 28-68-203 (a)) — that draftsmen of powers of attorney may wish to anticipate the appointment of a conservator or guardian for the principal — is new, and a brief explanation is in order.

When the Code* was originally drafted, the dominant idea was that durable powers would be used as alternatives to court-oriented, protective procedures. Hence, the draftsmen merely provided that appointment of a conservator for a principal who had granted a durable power to another did not automatically revoke the agency; rather, it would be up to the court's appointee to determine whether revocation was appropriate. The provision was designed to discourage the institution of court proceedings by persons interested solely in ending an agent's authority. It later appeared sensible to adjust the durable power concept so that it may be used

either as an alternative to a protective procedure, or as a designed supplement enabling nomination of the principal's choice for guardian to an appointing court and continuing to authorize efficient estate management under the direction of a court appointee.

The sponsoring committee considered and rejected the suggestion that the word "durable" be omitted from the title. While it is true that the act describes "durable" and "non-durable" powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly. In the case of non-durable powers, the act extends validity by the provi-

sions in Section [4] [5-504] protecting agents in fact and third persons who rely in good faith on a power of attorney when, unknown to them, the principal is incompetent or deceased. The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping "durable" would be misleading to the extent that it suggested otherwise.

*Uniform Probate Code.

Comment to § 1 (A.C.A. § 28-68-201)

This section, derived from the first sentence of UPC 5-501 (1969) (1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of

the agent in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law.

Comment to § 2 (A.C.A. § 28-68-202)

This section is derived from the second sentence of UPC 5-501 (1969) (1975) modified by deleting reference to the effect on a durable power of the principal's death, a matter that is now covered in Section [4] [5-504] which provides a single standard for durable and non-durable powers.

The words "any period of disability or incapacity of the principal" are intended to include periods during which the principal

is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.

Comment to § 3 (A.C.A. § 28-68-203)

Subsection (a) (A.C.A. § 28-68-203(a)) closely resembles the last two sentences of UPC § 5-501 (1969) (1975); most of the changes are stylistic. One change going beyond style states that an agent in fact is accountable both to the principal and a conservator or guardian if a court has appointed a fiduciary; the earlier version described accountability only to the fiduciary.

As explained in the introductory comment, the purpose of subsection (b) (A.C.A. § 28-68-203(b)) is to emphasize that agencies under durable powers and guardians or conservators may co-exist. It is not the purpose of the act to encourage resort to court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset by arranging matters so that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans. However, the evolution of a free-standing durable power act increases the prospects that UPC-type statutes covering protective proceedings will not apply when a protective proceeding is commenced for one who has created a durable power. This means that a court receiving a petition for a guardian or conservator may not be governed by standards like those in UPC § 5-304 (personal guardians) and § 5-401(2) and related sections which are designed to deter unnecessary protective proceedings. Finally, attorneys and others

may find various good uses for a regime in which a conservator directs exercise of an agent's authority under a durable power. For example, the combination would confer jurisdiction on the court handling the protective proceeding to approve or ratify a desirable transaction that might not be possible without the protection of a court order. The alternative of a declaratory judgment proceeding might be difficult or impossible in some states.

It is to be noted that the "fiduciary" described in subsection (a) (A.C.A. § 28-68-203(a)), to whom an attorney in fact under a durable power is accountable and who may revoke or amend the durable power, does not include a guardian of the person only. In subsection (b) (A.C.A. § 28-68-203(b)), however, the authority of a principal to nominate extends to a guardian of the person as well as to conservators and guardians of estates.

Discussion of this section in NCCUSL's Committee of the Whole involved the question of whether an agent's accountability, as described here, might be effectively countermanded by appropriate language in a power of attorney. The response was negative. The reference is to basic accountability like that owed by every fiduciary to his beneficiary and that distinguishes a fiduciary relationship from those involving gifts or general powers of appointment. The section is not intended to describe a particular form of accounting. Hence, the context differs from those involving statutory duties to account in court, or with specified frequency, where draftsmen of controlling instruments may be able to excuse statutory details relating to accountings without affecting the general principle of accountability.

Comment to § 4*

UPC §§ 5-501 and 5-502 (1969) (1975) are flawed by different standards for durable and non-durable powers vis a vis the protection of an attorney in fact who purports to exercise a power after the principal has died. Section 5-501 (1969) (1975), applicable only to durable powers, expresses a most unsatisfactory standard,

i.e. the attorney in fact is protected if the exercise occurs "during any period of uncertainty as to whether the principal is dead or alive..." Section 5-502 (1969) (1975), applicable only to non-durable powers, protects the agent who "without actual knowledge of the death ... of the principal, acts in good faith under the

power of attorney..." Section [4] [5-504] (a) expresses as a single test the standard now contained in § 5-502 (1969) (1975).

Subsection (b), applicable only to non-durable powers that are controlled by the traditional view that a principal's loss of capacity ends the authority of his agents, embodies the substance of UPC § 5-502 (1969) (1975).

The discussion in the Committee of the Whole established that the language "or other person" in subsections (a) and (b) is intended to refer to persons who transact business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute.

Also, there was discussion of possible conflict between the actual knowledge test here prescribed for protection of persons relying on the continuance of a power and constructive notice concepts under statutes governing the recording of instruments affecting real estate. The view was expressed in the Committee of the Whole that the recording statutes would continue to control since those statutes are specifically designed to encourage public recording of documents affecting land ti-

ties. It was also suggested that "good faith," as required by this section, might be lacking in the unlikely case of one who, without actual knowledge of the principal's death or incompetency, accepted a conveyance executed by an attorney in fact without checking the public record where he would have found an instrument disclosing the principal's death or incompetency. If so, there would be no conflict between this act and recording statutes.

It is to be noted, also, that this section deals only with the effect of a principal's death or incompetency as a revocation of a power of attorney; it does not relate to an express revocation of a power or to the expiration of a power according to its terms. Further, since a durable power is not revoked by incapacity, the section's coverage of revocation of powers of attorney by the principal's incapacity is restricted to powers that are not durable. The only effect of the Act on rules governing express revocations of powers of attorney is as described in Section [5] [5-5051].

*Section 4 of the uniform act was not enacted by the Arkansas General Assembly and is not codified in the Arkansas Code.

Comment to § 5*

This section, embodying the substance and form of UPC 5-502(b) (1969) (1975), has been extended to apply to durable powers. It is unclear whether UPC 5-502(b) (1969) (1975) applies to durable powers. Affidavits protecting persons dealing with attorneys in fact extend the utility of powers of attorney and plainly should be available for use by all attorneys in fact.

The matters stated in an affidavit that are strengthened by this section are limited to the revocation of a power by the principal's voluntary act, his death, or, in the case of non-durable power, by his incompetence. With one possible exception, other matters, including circumstances made relevant by the terms of the

instrument to the commencement of the agency or to its termination by other circumstances, are not covered. The exception concerns the case of a power created to begin on "incapacity." The affidavit of the agent in fact that all conditions necessary to the valid exercise of the power might be aided by the statute in relation to the fact of incapacity. An affidavit as to the existence or non-existence of facts and circumstances not covered by this section nonetheless may be useful in establishing good faith reliance.

*Section 5 of the uniform act is not codified in the Arkansas Code.

UNIFORM COMMON TRUST FUND ACT*
(§ 28-69-201 ET SEQ.)

Prefatory Note

A common trust fund is a group of securities set aside by a trustee for investment by two or more trusts operated by the same trustee. It is almost invariably used by banks and trust companies, and not by individual trustees.

The purposes of such a common or joint investment fund are to diversify the investments of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble.

Such a common trust fund cannot legally be operated without statutory sanction, because its operation involves a mixture of trust funds which was not permitted by doctrines of equity. There is a strong sentiment among trust men that the great utility of these common trust funds justifies a statutory exception to the rule regarding the mixture of two or more trust funds.

The Uniform Common Trust Fund Act is a simple enabling statute suitable for adoption by any state which is willing to permit banks and trust companies to set up one or more common trust funds. The Uniform Act does not set out in detail the restrictions on the operation of such common trust funds, except that they must be composed of investments legal for trusts in that state. The reason for not covering in this proposed Uniform State Act the details of the operation of such a common trust fund is that as a practical matter

such details are covered by the regulations issued by the Federal Reserve Board which went into effect December 31, 1937.

The Federal Revenue Act of 1936 provides that a common trust fund shall be taxed as an association on its income unless it is operated in accordance with regulations issued by the Federal Reserve Board. Consequently, every bank or trust company, whether a national or a state institution, will have to operate its common trust funds in accordance with the Federal Reserve Board regulations if it wants to escape the federal corporation income tax, and the difference between such tax and the individual income taxes assessed against the different beneficiaries of the trusts would be so great that no trustee could afford to operate its fund otherwise than in accordance with the Federal Reserve Board regulations.

Therefore, the passage by a state of the Uniform Common Trust Fund Act will enable banks and trust companies in that state to set up one or more common trust funds composed entirely of legal trust investments for its fiduciary funds, these common trust funds necessarily being subject to restrictions and regulations of the Federal Reserve Board as they exist from time to time.

*The Arkansas version of this act is quite different from the uniform act.

UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT (A.C.A. § 28-69-601 ET SEQ.)

Prefatory Note

Over the past several years the governing boards of eleemosynary institutions, particularly colleges and universities, have sought to make more effective use of endowment and other investment funds. They and their counsel have wrestled with questions as to permissible investments, delegation of investment authority, and use of the total return concept in investing endowment funds. Studies of the legal authority and responsibility for the management of the funds of an institution have pointed up the uncertain state of the law in most jurisdictions. There is virtually no statutory law regarding trustees or governing boards of eleemosynary institutions, and case law is sparse. In the late 1960's the Ford Foundation commissioned Professor William L. Cary and Craig B. Bright, Esq., to examine the legal restrictions on the powers of trustees and managers of colleges and universities to invest endowment funds to achieve growth, to maintain purchasing power, and to expend a prudent portion of appreciation in endowment funds. They concluded that there was little developed law but that legal impediments which have been thought to deprive managers of their freedom of action appear on analysis to be more legendary than real. Cary and Bright, *The Law and The Lore of Endowment Funds*, 66 (1969).

Nonetheless it appears that counsel for some colleges and universities have advised to the contrary, basing such advice upon analogy to the law of private trusts. Not all counsel, of course, suggest that private trust laws control the governing boards of eleemosynary institutions.

There is, however, substantial concern about the potential liability of the managers of the institutional funds even though cases of actual liability are virtually nil. As deliberations of the Special Committee, the Advisory Committee and the Reporters responsible for the preparation of this Act have progressed, it became clear that the problems were not unique to educational institutions but were faced by

any charitable, religious or any other eleemosynary institution which owned a fund to be invested.

One further problem regularly intruded upon the discussion of efforts to free trustees and managers from the alleged limitations on their powers to invest for growth and meet the financial needs of their institutions. Some gifts and grants contained restrictions on use of funds or selection of investments which imperiled the effective management of the fund. An expeditious means to modify obsolete restrictions seemed necessary.

The Uniform Act (A.C.A. § 28-69-601 et seq.) offers a rational solution to these problems by providing:

- (1) a standard of prudent use of appreciation in invested funds;
- (2) specific investment authority;
- (3) authority to delegate investment decisions;
- (4) a standard of business care and prudence to guide governing boards in the exercise of their duties under the Act; and
- (5) a method of releasing restrictions on use of funds or selection of investments by donor acquiescence or court action.

Use of Appreciation

The argument for allowing prudent use of appreciation of endowment funds has been stated in Cary and Bright, *The Law and The Lore of Endowment Funds* 5—6 (1969):

[T]oo often the desperate need of some institutions for funds to meet current operating expenses has led their managers, contrary to their best long-term judgment, to forego investments with favorable growth prospects if they have a low current yield. [I]t would be far wiser to take capital gains as well as dividends and interest into account in investing for the highest overall return consistent with the safety and preservation of the funds invested. If the current return is insufficient for the institution's

needs, the difference between that return and what it would have been under a more restrictive policy can be made up by the use of a prudent portion of capital gains.

The Uniform Act (A.C.A. § 28-69-601 et seq.) authorizes expenditure of appreciation subject to a standard of business care and prudence. It seems unwise to fix more exact standards in a statute. To impose a greater construction would hamper adaptation by different institutions to their particular needs.

The standard of care is that of a reasonable and prudent director of a nonprofit corporation—similar to that of a director of a business corporation—which seems more appropriate than the traditional Prudent Man Rule applicable to private trustees. The approach has been used elsewhere. A New York statute allows inclusion in income of “so much of the realized appreciation as the board may deem prudent.” New York [McKinney’s] Not-for-Profit Corporation Law § 513(d) (1970). Recent enactments in New Jersey, California, and Rhode Island follow the same pattern. N.J.S.A. § 15:18-8; West’s Anno. Corp. Code § 10251(c) (Calif.); Gen. Laws of R.I. § 18-2-2.

The Act (A.C.A. § 28-69-601 et seq.) authorizes the appropriation of net appreciation. “Realization” of gains and losses is an artificial, meaningless concept in the context of a nontaxable eleemosynary institution. If gains and losses had to be realized before being taken into account, a major objective of the Act (A.C.A. § 28-69-601 et seq.), to avoid distortion of sound investment policies, would be frustrated. If only realized capital gains could be taken into account, trustees or managers might be forced to sell their best assets, appreciated property, in order to produce spendable gains and conceivably might spend realized gains even when, because of unrealized losses, the fund has no net appreciation.

The Act (A.C.A. § 28-69-601 et seq.) excludes interests held for private beneficiaries, even though a charity is the ultimate beneficiary, e.g., an individual life interest followed by a charitable remainder. Also excluded is any trust managed by a professional trustee even though a charitable organization is the sole beneficiary.

The Uniform Act (A.C.A. § 28-69-601 et seq.) has been drafted to meet the objection that there will be a decline in gifts to charity because donors cannot rely on their wishes being enforced if appreciation can be expended. The drafters were convinced that donors seldom give any indication of how they want the growth in their gifts to be treated. If, however, a donor does indicate that he wishes to limit expenditures to ordinary yield, under the Act (A.C.A. § 28-69-601 et seq.) his wishes will be respected.

A statute such as this can be constitutionally applied to gifts received prior to its enactment. There is no substantial authority to be found in law or reason for denying retroactive application.

When the Uniform Principal and Income Act was adopted it changed the apportionment of some items of revenue between principal and income. It was argued that the retroactive application of the statute to existing trusts would deprive either the income beneficiaries or the remaindermen of their property without due process of law. Professor Scott spoke for the overwhelming majority of commentators when he said:

[T]here should be no constitutional objection to making the Act retroactive. The rules as to allocation should not be treated as absolute rules of property law, but rather as rules as to the administration of the trust. The purpose is to make allocations which are fair and impartial as between the successive beneficiaries. Scott, *Principal or Income?*, 100 *Trusts & Est.* 180, 251 (1961).

Professor Bogert reached the same conclusion. Bogert, *The Law of Trusts and Trustees* § 847, pp. 505—6 (2d ed. 1962). The courts which considered the matter reached the same conclusion.

There is even less reason to deny retroactive application to an apportionment statute which deals only with the endowment funds of eleemosynary institutions, because the statute does not deprive any beneficiary of vested property rights. In a broad sense, the public is the real beneficiary of an endowment fund. The only argument which can be made against retroactivity is that it might violate the intent of the donor. Such an argument was

also made in respect of the Uniform Principal and Income Act, but it was uniformly rejected by the courts. The language of a Minnesota case is typical:

[I]t is doubtful whether testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends to go where the law required them to go at the time they were received by the trustee. . . . *In re Gardner's Trust*, 266 Minn. 127, 132, 123 N.W.2d 69, 73 (1963).

In any event, the Act (A.C.A. § 28-69-601 et seq.) does not raise a problem of retroactive application because the rule of construction of Section 3 (A.C.A. § 28-69-604) is declaratory of existing law in that it interprets the presumed intent of the donor in the absence of a clear statement of the donor's intention.

Other similar acts follow the same pattern. The New York [McKinney's] Not-for-Profit Corporation Law Section 513(e) (1970) authorizing the expenditure of appreciation applies to assets "held at the time when this chapter takes effect" as well as to "assets hereafter received." Similar language appears in the New Jersey, California, and Rhode Island acts authorizing expenditure of appreciation by eleemosynary institutions.

Specific Investment Authority

It seems reasonably clear that investment managers of endowment funds are not limited to investments authorized to trustees. The broad grant of investment authority contained in Section 4 (A.C.A. § 28-69-605) of the Act expressly so provides.

Authority to Delegate

In the absence of clear law relating to the powers of governing boards of eleemosynary institutions, some boards have been advised that they are subject to the nondelegation strictures of professional private trustees. The board of an eleemo-

synary institution should be able to delegate day-to-day investment management to committees or employees and to purchase investment advisory or management services. The Act (A.C.A. § 28-69-601 et seq.) so provides.

Standard of Care

Fear of liability of a private trustee may have a debilitating effect upon members of a governing board, who are often uncompensated public-spirited citizens. They are managers of nonprofit corporations, guiding a unique and perhaps very large institution. The proper standard of responsibility is more analogous to that of a director of a business corporation than that of a professional private trustee. The Act (A.C.A. § 28-69-601 et seq.) establishes a standard of business care and prudence in the context of the operation of a nonprofit institution.

Release of Restrictions

It is established law that the donor may place restrictions on his largesse which the donee institution must honor. Too often, the restrictions on use or investment become outmoded or wasteful or unworkable. There is a need for review of obsolete restrictions and a way of modifying or adjusting them. The Act (A.C.A. § 28-69-601 et seq.) authorizes the governing board to obtain the acquiescence of the donor to a release of restrictions and, in the absence of the donor, to petition the appropriate court for relief in appropriate cases.

Conclusion

Over a decade ago, Professor Kenneth Karst in an article in the *Harvard Law Review* stated the need for the Uniform Act:

[T]he managers of corporate charity are still, at this late date, without adequate guides for conduct. The development of these standards is of some urgency. The Efficiency of the Charitable Dollar: An Unfilled State Responsibility, 73 *Harv. L. Rev.* 433, 435 (1960).

Comment to § 1 (A.C.A. § 28-69-602)

The Uniform Act (A.C.A. § 28-69-601 et seq.) applies generally to colleges, universities, hospitals, religious organizations and other institutions of an eleemosynary nature. It applies to a governmental organization to the extent that the organization holds funds for the listed purposes, e.g., a public school which has an endowment fund.

[Subsec. (1)] (A.C.A. § 28-69-602(1)) A non-governmental institution which is not "charitable" in the classic sense is not within the Act (A.C.A. § 28-69-601 et seq.), even though it may hold funds for such purpose. If the fund is separate and distinct from the noncharitable organization, the fund itself may be an institution, to which the Act applies.

[Subsec. (2)] (A.C.A. § 28-69-602(2)) An institutional fund is any fund held by an institution which it may invest for a long or short term. Excluded from the Act (A.C.A. § 28-69-601 et seq.) is any fund held by a trustee which is not an institution as defined in this Act (A.C.A. § 28-69-601 et seq.), e.g., a bank or trust company, for the benefit of an institution even though the institution is the sole beneficiary.

A fund held by an institution for the benefit of any noninstitutional beneficiary is also excluded. The exclusion would apply to any fund with an individual beneficiary such as an annuity trust or a unitrust. When the interest of a noninstitutional beneficiary is terminated, the fund may then become an institutional fund.

The "use, benefit, or purposes" of an institution broadly encompasses all of the activities permitted by its charter or other source of authority. A fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the institution's purposes. Such a fund is not deemed to be held for the benefit of a particular student or patient as distinct from the use, benefit, or purposes of the institution, nor does the student or patient have an interest in the fund as a "beneficiary which is not an institution."

The particular recipient of the aid of a charitable organization is not a "beneficiary" in the sense of a beneficiary of a

private trust; only the Attorney General or similar public authority may enforce a charitable trust. 4 Scott, *Law of Trusts* § 348 pp. 2768-9 (3d ed. 1967); Bogert, *The Law of Trusts and Trustees* §§ 411-15 pp. 317-348 (2d ed. 1962).

[Subsec. (3)] (A.C.A. § 28-69-602(3)) An endowment fund is an institutional fund, or any part thereof, which is held in perpetuity or for a term and which is not wholly expendable by the institution. Implicit in the definition is the continued maintenance of all or a specified portion of the original gift. "Endowment fund" is specially defined because it is subject to the appropriation rules of Section 2 (A.C.A. § 28-69-603).

A restriction on use that makes a fund an endowment fund arises only from the applicable gift instrument. If a governing board has the power to spend all of a fund but, in its discretion, decides to invest the fund and spend only the yield or appreciation therefrom, the fund does not become an endowment fund under this description, but it may be described as a "quasi-endowment fund" or a "fund functioning as endowment."

A fund which is not an institutional fund originally and therefore not an endowment fund may become an endowment fund at a later time. For example, a fund given to an institution to pay the grantor's widow a life income, with the remainder to the institution, would become an institutional fund on the widow's death, and, if the fund were not then wholly expendable, it would become an endowment fund at that time.

If a gift instrument provided that the institution could use the income from the fund for ten years and thereafter spend the entire principal, the fund would be an endowment fund for the ten-year period and would cease to be an endowment fund at the time it became wholly expendable.

[Subsec. (4)] (A.C.A. § 28-69-602(4)) The definition is meant to designate the policy making or management group which has the responsibility for the affairs of the institution or the fund.

[Subsec. (5)] (A.C.A. § 28-69-602(5)) "Historic dollar value" is simply the value of the fund expressed in dollars at the time of the original contribution to the

fund plus the dollar value of any subsequent gifts to the fund. Accounting entries recording realization of gains or losses to the fund have no effect upon historic dollar value. No increase or decrease in historic dollar value of the fund results from the sale of an asset held by the fund and the reinvestment of the proceeds in another asset.

If the gift instrument directs accumulation, the historic dollar value will increase with each accumulation. For example, if a donor gives an institution \$300,000 and directs that the fund is to be accumulated until its value reaches \$500,000, the historic dollar value will be the aggregate value of \$500,000 at the time the fund

becomes available for use by the institution.

If under the terms of the gift instrument a portion of an endowment fund, after passage of time or upon the happening of some event, becomes currently wholly expendable, such portion should be treated as a separate fund and the historic dollar value of the remaining endowment fund should be reduced proportionately.

[Subsec. (6)] (A.C.A. § 28-69-602(6)) A gift instrument establishes the terms of the gift. It may be a writing of any form, or it may result from the institution's solicitation activities, or the by-laws, or other rules of an existing fund.

Comment to § 2 (A.C.A. § 28-69-603)

This section authorizes a governing board to expend for the purposes of the fund the increase in value of an endowment fund over the fund's historic dollar value, within the limitations of Section 6 (A.C.A. § 28-69-607) which establishes a standard of business care and prudence.

The section (A.C.A. § 28-69-607) does not apply to funds which are wholly expendable by the institution such as so-

called "quasi-endowment funds" or "funds functioning as endowment," nor does the section limit or reduce any spending power granted by a gift instrument or otherwise held by the institution.

Unrealized gains and losses must be combined with realized gains and losses to insure that the historic dollar value is not impaired.

Comment to § 3 (A.C.A. § 28-69-604)

If a gift instrument expresses or otherwise indicates the donor's intention that the governing board may not appropriate the appreciation in the value of the fund, his wishes will govern.

The rule of construction of this section (A.C.A. § 28-69-604) is based upon the assumption that a grantor who makes an outright gift to an educational, religious, charitable or other eleemosynary institution seldom makes a full statement of his intentions and that his unstated intention is usually quite different from the intention of a grantor who makes a gift to a trust for private beneficiaries. The assumption is that the grantor of a gift to an institution: (1) means to devote to the institution any return or benefit that the institution can obtain from the gift, (2) acknowledges the responsibility of the institutional management to determine the prudent use of the return or benefit over time and (3) usually regards the "amount" of the gift as the dollars given or the dollar

value of the property transferred to the institution at the time of the gift. Thus, in the case of a gift instrument which states no clear intention or merely echoes the rubrics of a private trust, the statutory rule of interpretation should apply.

Some advisers to institutions, aware of the body of private trust law, have interpreted references to "income" or "principal" in a gift instrument to evidence a grantor's intent that the private trust rules developed to insure equity between an income beneficiary and a remainderman should be applied to an outright gift to an institutional donee. Neither the facts of donor's intentions nor the law of trusts support such an interpretation of the meaning of gift instruments where an institution is the sole beneficiary.

This section (A.C.A. § 28-69-604) does not purport to change existing law or rights; it simply codifies a rule of construction or interpretation or administration by articulating the presumed intent of a

donor in the absence of a statement of the donor's actual intent.

Comment to § 4 (A.C.A. § 28-69-605)

Institutional investment managers suggest that a general grant of investment powers will clarify the authority of a governing board to select investments. Subsection (1) (A.C.A. § 28-69-605(1)) provides broad powers of investment and states that a governing board is not restricted to investments authorized to trustees.

Two other matters of investment policy have been troublesome to boards because of the absence of specific authority. Subsections (2) and (3) (A.C.A. § 28-69-605(2) and (3)) provide authority to hold property given by a donor even though it may not be the best investment (ordinarily in the hope of obtaining additional contribu-

tions) and to invest in common or pooled investment funds such as the Common Fund for Non-Profit Organizations. See 4 Scott, *Law of Trusts*, § 389 pp. 2997-3000 (3d ed. 1967).

The absence of specific reference to investment for return by an institution in its own facilities does not limit the power of a governing board to make such investments under the general clause of Section 4(1) (A.C.A. § 28-69-605(1)), or other law or the gift instrument.

Section 6 (A.C.A. § 28-69-607) establishes the standard of care and prudence under which the investment authority is exercised.

Comment to § 5 (A.C.A. § 28-69-606)

Questions have arisen about the power of a governing board to delegate investment decisions. In the absence of authority, some boards have tried to follow the nondelegation principles applicable to trustees. Governing boards do, in fact, delegate investment authority, sometimes with rather cumbersome procedures to produce a record of apparent decisions by the boards.

This section (A.C.A. § 28-69-606) clarifies the authority to delegate investment management and to purchase investment advisory and management services. Responsibility for investment policy and selection of competent agents remains with the board under the Section 6 (A.C.A. § 28-69-607) standard of business care and prudence.

Comment to § 6 (A.C.A. § 28-69-607)

The section (A.C.A. § 28-69-607) establishes a standard of care and prudence for a member of a governing board. The standard is generally comparable to that of a director of a business corporation rather than that of a private trustee, but it is cast in terms of the duties and responsibilities of a manager of a nonprofit institution.

Officers of a corporation owe a duty of care and loyalty to the corporation, and the more intimate the knowledge of the affairs of the corporation the higher the standard of care. Directors are obligated to act in the utmost good faith and to

exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated.

The standard of Section 6 (A.C.A. § 28-69-607) was derived in part from Proposed Treasury Regulations § 53.4944-1(a)(2) dealing with the investment responsibility of managers of private foundations.

The standard requires a member of a governing board to weigh the needs of today against those of the future.

Comment to § 7 (A.C.A. § 28-69-608)

One of the difficult problems of fund management involves gifts restricted to uses which cannot be feasibly administered or to investments which are no longer available or productive. There should be an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose. *Cy pres* has not been a satisfactory answer and is reluctantly applied in some states. See *Restatement of Trusts* (2d), §§ 381, 399; 4 Scott, *Law of Trusts* § 399, p. 3084, § 399.4 pp. 3119 et seq. (3d ed. 1967).

This section (A.C.A. § 28-69-608) permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden. See *Restatement of Trusts* (2d) § 367. Scott suggests that in minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust. 4 Scott, § 367.3 p. 2846 (3d ed. 1967).

If the donor is unable to consent or cannot be identified, the appropriate court may upon application of a governing board release a limitation which is shown to be obsolete, inappropriate or impracticable.

This section (A.C.A. § 28-69-608) authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, or he could acquiesce in the

release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school.

Subsection (d) (A.C.A. § 28-69-608(d)) makes it clear that the Act (A.C.A. § 28-69-601 et seq.) does not purport to limit the established doctrine of *cy pres*. A liberalization of addition to, or substitute for *cy pres* is not without respectable support. Professor Kenneth Karst in "The Efficiency of the Charitable Dollar: An Unfilled State Responsibility," 73 *Harv.L.Rev.* 433 (1960) suggested that the doctrine of *cy pres* be expanded to permit the courts to redirect charitable grants if the purpose had become "obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment..." quoting from the Nathan Report (of the British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision (A.C.A. § 28-69-608(d)) is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

New England courts apply a rather strict doctrine of separation of powers to deny legislative encroachment on judicial *cy pres*. The Act (A.C.A. § 28-69-601 et seq.) is compatible with the New England cases because the final decision is in the courts. See *City of Hartford v. Larrabee Fund Association*, 161 Conn. 312, 288 A.2d 71 (1971); Opinion of Justices, 101 N.H. 531, 133 A.2d 792 (1957).

No federal tax problems for the donor are anticipated by permitting release of a restriction. The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.

UNIFORM PRINCIPAL AND INCOME ACT (§ 28-70-101 ET SEQ.)

Prefatory Note

1962 Act

In 1959 the National Conference of Commissioners on Uniform State Laws created a committee of its members to prepare a revision of the Uniform Principal and Income Act which had been approved by the Commissioners in 1931. Early in its deliberations the committee proposed to submit a revised Act rather than a series of correcting amendments to the existing Act. The committee submitted three different drafts of an Act to three separate annual conferences from 1960 to 1962. In the latter year the final draft of the Uniform Revised Principal and Income Act was approved by the Commissioners and later was approved by the American Bar Association.

Request for revision of the old Act came from several sources, particularly from trustees who found it difficult to administer trusts under the older Act due to the development of new forms of investment property for trustees. This new development was especially true in the field of corporate distributions and also in the holding of mineral resources as a trust investment. The revised Act provides as did the original Act that the settlor's intent is the guiding principle which should control the disposition of all receipts. But settlors have not always foreseen the multitude of problems which may have to be faced and even draftsmen have found it difficult to foresee all the possible kinds of receipts and disbursements. It is important, therefore, to set forth some clear and uniform standards to assist those to whom the power of decision has been committed, that is, the trustees, and this Act attempts to provide these standards.

The aim of the revised Act is simplicity and convenience of administration of the estate. Of course, fairness to all beneficiaries both present and future has also been considered. Because simplicity and convenience were a primary aim of the revised Act, the revised Act unlike the original Act is made applicable to all trusts and es-

tates whether in existence at the time the revised Act becomes law or not. A trustee who administers several trusts, it was thought, would have difficulty attempting to administer the various trusts under different rules for distribution of receipts and allocation of disbursements and it was thought better, therefore, to make the Act applicable to all trusts. The original Act had no section treating with income earned during administration of a decedent's estate. Several years before it was decided to revise the Uniform Act the Commissioners had promulgated an amendment to the original Act dealing with this problem and this amendment is in substance carried forward into the revised Act.

The original Act followed the so-called "Massachusetts Rule" of awarding cash dividends on corporate stock to income and stock dividends to principal, thereby rejecting the Pennsylvania Rule or some variation of it requiring apportionment between the two funds. The revised Act continues to follow the Massachusetts Rule but provides for some newer problems which have arisen since the original Act was promulgated. Thus provision is now made for corporate distributions pursuant to a court decree such as a divestiture order in an anti-trust suit. Provision is also made for treatment of the distributions of a regulated investment company or real estate investment trust. Since the original Act was promulgated development has occurred in methods of issuing bonds, notably the discount type of bond such as the Series E bond of the United States government and provision had been made for allocating the increment in value between principal and income. When the various states considered and adopted the original Act there were a lot of changes made in the section concerning disposition of natural resources. The revised Act attempts to collect the most common of these variations and provides

for an allocation of natural resources substantially different from that provided in the original Act but not substantially different from the rules adopted in many of the states producing natural resources. Because of the difficulty of apportioning receipts from extraction of natural resources among the income and principal beneficiaries it is provided in the revised Act that an arbitrary allocation should occur, that is, 27 1/2% of the gross receipts shall be added to the principal as a "depletion reserve," and the balance should be payable to the income beneficiary. Attempts to apportion the receipts on the relation of the amount of minerals extracted to the amount of minerals remaining in the ground have proved difficult of

calculation and this method of allocation was accordingly rejected in favor of simplicity.

While the revised Act continues to deal specifically with a number of subjects as did the original Act, the revised Act also contains a "catchall" providing for disposition of receipts where there is no specific section in the Act dealing with the allocation. A form of "prudent man" rule has been adopted to handle this situation.

The Act, therefore, sets forth simple and workable rules of administration which are believed to be consistent with the wishes of settlors upon the subject treated unless the settlor specifically provides for a different treatment in his own trust instrument.

UNIFORM CUSTODIAL TRUST ACT

(A.C.A. § 28-72-401 ET SEQ.)

Prefatory Note

This Uniform Act (A.C.A. § 28-72-401 et seq.) provides for the creation of a statutory custodial trust for adults to be governed by the provisions of the Act (A.C.A. § 28-72-401 et seq.) whenever property is delivered to another "as custodial trustee under the (Enacting state) Uniform Custodial Trust Act." The provisions of this Act (A.C.A. § 28-72-401 et seq.) are based on trust analogies to concepts developed and used in establishing custodianships for minors under the Uniform Transfers to Minors Act (UTMA) (A.C.A. § 9-26-201 et seq.). The Custodial Trust Act (A.C.A. § 28-72-401 et seq.) is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attorneys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity. The statute (A.C.A. § 28-72-401 et seq.) will also be available for accomplishing distribution of funds by judgment debtors and others to incapacitated persons for whom a conservator has not been appointed. Since this Act (A.C.A. § 28-72-401 et seq.) allows any person, competent to transfer property, to create custodial trusts for the benefit of themselves or others, with the beneficial interest in custodial trust property in the beneficiary and not in the custodial trustee, its potential for use is extensive. Although the most frequent use probably will be by elderly persons, it is also available for a parent to establish a custodial trust for an adult child who may be incapacitated; for adult persons in the military, or those leaving the country temporarily, to place their property with another for management without relinquishing beneficial ownership of their property; or for young people who have received property under the Uniform Transfers to Minors Act

(A.C.A. § 9-26-201 et seq.) to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

This Act (A.C.A. § 28-72-401 et seq.) follows the approach taken by the Uniform Transfers to Minors Act (A.C.A. § 9-26-201 et seq.) and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodial trustee for the benefit of a beneficiary. However, the most typical transaction envisioned would involve a person who would transfer intangible property, such as securities or bank accounts, to a custodial trustee but with retention by the transferor of direction over the property. Later, this direction could be relinquished, or it could be lost upon incapacity. The objective of the statute (A.C.A. § 28-72-401 et seq.) is to provide a simple trust that is uncomplicated in its creation, administration, and termination. The potential for tax problems is minimized by permitting the beneficiary in most instances to retain control while the beneficiary has capacity to manage the assets effectively. The statute (A.C.A. § 28-72-401 et seq.) contains an asset specific transfer provision that it is believed will be simple to use and will gain the acceptance of the securities and financial industry. A simple transfer document, examples of which are set forth in the Act (A.C.A. § 28-72-401 et seq.), and a receipt from the custodian, also in the Act (A.C.A. § 28-72-401 et seq.), would provide for identification of beneficiaries or distributees upon death of the beneficiary. Protection is extended to third parties dealing with the custodian. Although the Act is patterned on the Uniform Transfers to Minors Act (A.C.A. § 9-26-201 et seq.) and meshes into the Uniform Probate Code, it is appropriate for enactment as well in states which have not adopted either UTMA (A.C.A. § 9-26-201 et seq.) or the UPC.

An adult beneficiary, who is not incapacitated, may: (1) terminate the custodial trust on demand (Section 2(e)) (A.C.A. § 28-72-402(e)); (2) receive so much of the income or custodial property as he or she may request from time to time (Section 9(a)) (A.C.A. § 28-72-409(a)); and (3) give the custodial trustee binding instructions for investment or management (Section 7(b)) (A.C.A. § 28-72-407(b)). In the absence of direction by the beneficiary, who is not incapacitated, the custodial trustee manages the property subject to the standard of care that would be observed by a prudent person dealing with the property of another and is not limited by other statutory restrictions on investments by fiduciaries. (Section 7) (A.C.A. § 28-72-407).

A principal feature of the Custodial Trust under this Act (A.C.A. § 28-72-401 et seq.) is designed to protect the beneficiary and his or her dependents against the perils of the beneficiary's possible future incapacity without the necessity of a conservatorship. Under Section 10 (A.C.A. § 28-72-410), the incapacity of the beneficiary does not terminate (1) the custodial trust, (2) the designation of a successor custodial trustee, (3) any power or authority of the custodial trustee, or (4) the immunities of third persons relying on actions of the custodial trustee. The custodial trustee continues to manage the property as a discretionary trust under the prudent person standard for the benefit of the incapacitated beneficiary.

Means of monitoring and enforcing the custodial trust include provisions requiring the custodial trustee to keep the beneficiary informed, requiring accounting by the custodial trustee (Section 15) (A.C.A. § 28-72-415), providing for removal of the custodial trustee (Section 13) (A.C.A.

§ 28-72-413), and the distribution of the assets on termination of the custodial trust (Section 17) (A.C.A. § 28-72-417). The custodial trustee is protected in Section 16 (A.C.A. § 28-72-416) by the statutes of limitation on proceedings against the custodial trustee.

Transactions with the custodial trustee should be executed readily and quickly by third parties because their rights and protections are determined by the Act (A.C.A. § 28-72-401 et seq.) and a third party acting in good faith has no need to determine the custodial trustee's authority to bind the beneficiary with respect to property and investment matters. (Section 11) (A.C.A. § 28-72-411). The Act (A.C.A. § 28-72-401 et seq.) generally limits the claims of third parties to recourse against the custodial property, with the beneficiary insulated against personal liability unless he or she is personally at fault and the custodial trustee is similarly insulated unless the custodial trustee is personally at fault or failed to disclose the custodial capacity when entering into a contract (Section 12) (A.C.A. § 28-72-412).

As a consequence of the mobility of our population, particularly the mature persons who are most likely to utilize this Act (A.C.A. § 28-72-401 et seq.), uniformity of the laws governing custodial trusts is highly desirable, and the Act (A.C.A. § 28-72-401 et seq.) is designed to avoid conflict of laws problems. A custodial trust created under this Act (A.C.A. § 28-72-401 et seq.) remains subject to this Act despite a subsequent change in the residence of the transferor, the beneficiary, or the custodial trustee or the removal of the custodial trust property from the state of original location. (Section 19) (A.C.A. § 28-72-419).

Comment to § 1 (A.C.A. § 28-72-401)

(1) (A.C.A. § 28-72-401(1)) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under

Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2053(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long

as possible. The difference has little or no practical consequence and serves the purpose of each Act.

(3) (A.C.A. § 28-72-401(3)) "Conservator" is defined broadly to permit identification of a person functioning as a conservator.

(4) (A.C.A. § 28-72-401(4)) "Court" means _____ court. Here the likelihood is that most states would utilize the same court. e.g., the probate court, that deals with conservators and estates.

(5 and 6) (A.C.A. § 28-72-401(5) and (6)) The terms "custodial trust property" and "custodial trustee," are used throughout to identify clearly the statutory trust property and trustee under this Act (A.C.A. § 28-72-401 et seq.). The statutory trust concept is used throughout the Act.

(7) (A.C.A. § 28-72-401(7)) A definition of guardian has been included and is based on the Uniform Probate Code Section 5-103(6).

(8) (A.C.A. § 28-72-401(8)) A definition of incapacitated has been included, for the purpose of this Act (A.C.A. § 28-72-401 et seq.), because incapacity of the beneficiary

converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-401(c) relating to the person who is unable to manage property. Compare Uniform Probate Code Section 5-103(7). Note that Section 10(a)(ii) (A.C.A. § 28-72-410(a)(ii)) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 10 (A.C.A. § 28-72-410) deals specifically with the determination of incapacity.

(10) (A.C.A. § 28-72-410) The beneficiary's family is broadly defined to identify persons who may have standing to seek judicial intervention or accounting (Sections 13 and 15) (A.C.A. §§ 28-72-413 and 28-72-415).

(11) (A.C.A. § 28-72-411) The definition of a person is taken from the Uniform Probate Code Section 1-201(29).

(12) (A.C.A. § 28-72-412) Personal representative is broadly defined and the definition reflects that in the Uniform Probate Code Section 1-201(30).

Comment to § 2 (A.C.A. § 28-72-402)

Section 2 (A.C.A. § 28-72-402) is the principal provision authorizing the creation of a custodial trust and utilizes the concept of incorporation by reference when the transferee or titleholder of property is designated as custodial trustee under the Act (A.C.A. § 28-72-401 et seq.). Section 2 (A.C.A. § 28-72-402) sets forth the general effect of such a transfer. Section 18 (A.C.A. § 28-72-418) provides forms which satisfy the requirements of this section (A.C.A. § 28-72-402) and identifies customary methods of transferring assets to create a custodial trust.

Section 2(a) (A.C.A. § 28-72-402(a)) provides that a trust may be created by transfer to another for the benefit of the transferor or another. This is expected to be the most common way in which a custodial trust would be created. However, a custodial trust may also be created by declaration of trust by the owner of property to hold it for the benefit of another as is provided in Section 2(b) (A.C.A. § 28-72-402(b)). A declaration in trust by the owner of property for the sole benefit of the owner is not contemplated by this Act (A.C.A. § 28-72-401 et seq.) because

such an attempt may be considered ineffective as a trust due to the total identity of the trustee and beneficiary. However, the doctrine of merger would not preclude an effective transfer under this Act (A.C.A. § 28-72-401 et seq.) for the benefit of the transferor and one or more other beneficiaries. See Section 6 (A.C.A. § 28-72-406).

A custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property as one of the transfers "consistent with law."

These alternatives permit the major uses of the custodial trust to be accomplished expeditiously. For example, an older person, wishing to be relieved of management of property may transfer property to another for benefit of the transferor or of the transferor's spouse or child. The declaration may be used to establish a trust of which the owner is trustee to continue management of the property for benefit of another, such as a spouse or child. The trust may include a provision for distribution of assets re-

maintaining at the beneficiary's death directly to a named distributee.

This Act (A.C.A. § 28-72-401 et seq.) does not preclude the creation of trusts under existing law, statutory or nonstatutory, but is designed to facilitate the creation of simple trusts incorporating the provisions of this Act (A.C.A. § 28-72-401 et seq.). The written transfer or declaration "consistent with law" requires that the formalities of the transfer of particular property necessary under other law will be observed, e.g., if land is involved, the requirements of a proper deed and recording must be satisfied.

Section 2(c) (A.C.A. § 28-72-402(c)) provides for the retention of the beneficial interest in the custodial trust property in the beneficiary and, of course, not in the custodial trustee. The extensive control and benefit in the beneficiary who is not incapacitated maintains the simplicity of the trust and avoids tax complexity. The custodial trustee is given the title to the property and authority to act with regard to the property only as is authorized by the statute. The custodial trustee's powers are enumerated in Section 8 (A.C.A. § 28-72-408).

Section 2(e) (A.C.A. § 28-72-402(e)) gives the adult beneficiary, who is not incapacitated, the power to terminate the custodial trust at any time during his or her lifetime. This power of termination exists in any beneficiary who is not incapacitated whether the beneficiary was or was not the transferor. A beneficiary may be determined to be incapacitated or the transferor may designate that the trust is to be administered as a trust for an incapacitated beneficiary under Section 10 (A.C.A. § 28-72-410), in which event the beneficiary does not have the power to terminate. However, the designation of

incapacity by the transferor can be modified by the trustee or the court by reason of changed circumstances pursuant to Section 10 (A.C.A. § 28-72-410). The Act precludes (A.C.A. § 28-72-401 et seq.) termination by exercise of a durable power of attorney if the beneficiary is incompetent (Section 7(f)) (A.C.A. § 28-72-407(f)). If the donor prefers not to permit the beneficiary the power to terminate or to designate the beneficiary as incapacitated under Section 10 (A.C.A. § 28-72-410), an individually drafted trust outside the scope of this Act (A.C.A. § 28-72-401 et seq.) would seem appropriate.

Upon termination of a custodial trust, the custodial trust property must be distributed as provided in Section 17 (A.C.A. § 28-72-417).

A transfer under this Act (A.C.A. § 28-72-401 et seq.) is irrevocable except to the extent the beneficiary may terminate it. Hence, a transfer to a trustee for benefit of a person other than the transferor is not revocable by the transferor. If a power of revocation were retained by the transferor, that would be a trust outside the scope of this Act (A.C.A. § 28-72-401 et seq.) and enforceable under general law pursuant to subsection 2(h) (A.C.A. § 28-72-402(h)).

This Act (A.C.A. § 28-72-401 et seq.) does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act (A.C.A. § 28-72-401 et seq.).

Comment to § 3 (A.C.A. § 28-72-403)

This section (A.C.A. § 28-72-403) permits a future custodial trustee to be designated to receive property for the beneficiary of a custodial trust to be effective upon the occurrence of a future event or transfer. To accommodate changes in circumstances during the passage of time, one or more successors or substitute custodial trustees can also be designated. The designation of the future custodial trustee

and the beneficiary can be made in an instrument which is revocable or irrevocable depending upon the nature of the transaction or transfer. Any person designated as a future custodial trustee may decline to serve before the transfer occurs or may resign under Section 13 (A.C.A. § 28-72-413) after the transfer.

The source of this section (A.C.A. § 28-72-403) is Section 3 of UTMA.

The enacting state's rule against perpetuities may limit or affect the creation of a custodial trust upon the occurrence of a future event, but because the use of a

custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise.

Comment to § 4 (A.C.A. § 28-72-404)

Although a custodial trust is created by a transfer that satisfies Section 2 (A.C.A. § 28-72-402) of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act (A.C.A. § 28-72-401 et seq.). The acceptance can be expressed or implied,

but it is recommended that the written acceptance provided for in Section 4(b) (A.C.A. § 28-72-404(b)) be utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA (A.C.A. §§ 9-26-208 and 9-26-209) and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

Comment to § 5 (A.C.A. § 28-72-405)

This section (A.C.A. § 28-72-405) is in the nature of a facility-of-payment provision that permits persons owing money to an incapacitated individual to discharge a fixed obligation by a payment to a custodial trustee under this Act (A.C.A. § 28-72-401 et seq.). The section (A.C.A. § 28-72-405) does not authorize the custodial trustee to settle claims for disputed amounts but only to acknowledge an effective receipt of property paid or delivered.

It is based primarily on Sections 6 and 7 of UTMA (A.C.A. §§ 9-26-206 and 9-26-207) and includes the protections of Section 8 of UTMA (A.C.A. § 9-26-208) as well. It permits a custodial trust to be established as a substitute for a conservatorship to receive payments due an incapacitated individual. Also, see Section 11 (A.C.A. § 28-72-411), which protects transferors and other third parties dealing with the custodial trustee.

Comment to § 6 (A.C.A. § 28-72-406)

This act (A.C.A. § 28-72-401 et seq.), unlike UTMA (A.C.A. § 9-26-201 et seq.), does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each beneficiary are separate and the custodial trustee is obligated under subsection (c) (A.C.A. § 28-72-406(c)) to

account separately to each beneficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (b) (A.C.A. § 28-72-406(b)) allows a custodial trustee who is administering multiple custodial trusts for the same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitated beneficiary, the custodial trustee can administer them as a single custodial trust.

Comment to § 7 (A.C.A. § 28-72-407)

Subsection (b) (A.C.A. § 28-72-407(b)) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the beneficiary has not directed him. Under Sections 9 and 10 (A.C.A. §§ 28-72-409 and 28-72-410), when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken from Section 7-302 of

the Uniform Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section (A.C.A. § 28-72-407) is taken from Section 12 of UTMA (A.C.A. § 9-26-212). Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section (A.C.A. § 28-72-407) is entitled "general duties" because there are additional specific duties identified in other sections such as Section 9 (A.C.A. § 28-72-409).

Comment to § 8 (A.C.A. § 28-72-408)

This section (A.C.A. § 28-72-408) is taken from Section 13 of UTMA (A.C.A. § 9-26-213). It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act (A.C.A. § 28-72-401 et seq.). An alternative approach to subsection (a) (A.C.A. § 28-72-

408(a)) that might be taken by an enacting state is to refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [(a) A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

Comment to § 9 (A.C.A. § 28-72-409)

This section (A.C.A. § 28-72-409) provides that the custodial trustee is obligated to follow the directions of the beneficiary who is not incapacitated in paying over or expending custodial trust property. If the beneficiary is incapacitated, this section (A.C.A. § 28-72-409) imposes duties on the custodial trustee to apply funds for the beneficiary similar to those imposed on custodians for minors under Section 14 of UTMA (A.C.A. § 9-26-214). In addition, however, subsection (b) (A.C.A. § 28-72-409(b)) authorizes a custodial trustee to pay over or expend custodial trust property for the use and benefit of the incapacitated beneficiary's dependents who were supported by the beneficiary at the time the beneficiary became incapacitated or for whom there is a legal obligation to support.

The use-and-benefits standard for the expenditure of custodial property is intended to avoid any implication that the custodial trust property can be used only for the required support of the incapacitated beneficiary.

Subsection (c) (A.C.A. § 28-72-409(c)) allows a custodial trustee to maintain a bank account, of an amount reasonable under the circumstances, with the beneficiary whereby both the beneficiary and the custodial trustee may write checks on the account. This may be used as one method of making money available for the beneficiary's personal needs. Many incapacitated persons, unable to manage business affairs, are still competent to pay personal expenses. This type of arrangement would be important to them. A custodial trustee should maintain, of course, a separate bank account for use in managing the custodial trust property and investments.

An alternative approach might be taken to this section that refers to the distributive powers of a conservator under the laws of the enacting state, in the event that state should prefer that incorporation by reference. For example: [The custodial trustee has the distributive powers of a conservator under the Uniform Probate Code.]

Comment to § 10 (A.C.A. § 28-72-410)

This (A.C.A. § 28-72-410) is one of the more important sections of the Act (A.C.A. § 28-72-401 et seq.) under which the custodial trustee may determine that the beneficiary is incapacitated so the trust will change from one subject to the control of the beneficiary to a discretionary trust for the beneficiary. Subsection (b) (A.C.A. § 28-72-410(b)) allows the custodial trustee to determine that the beneficiary is incapacitated provided the determination is based upon the certificate of the beneficiary's physician, the prior direction or authority of the beneficiary, or other reasonable evidence. That authority could be evidenced, for example, by a durable power of attorney executed by the beneficiary prior to becoming incapacitated even though that power of attorney is not otherwise effective to control management or termination of the custodial trust. Such a durable power of attorney could be given to a child, spouse, friend, or other trusted individual. In addition, specific authority is provided in subsection (d) (A.C.A. § 28-72-410(d)) for the beneficiary, the custodial trustee, or other interested person to seek a declaration from the court as to the capacity of the beneficiary for the purposes of this Act. This is important to the custodial trustee, as his duties and responsibilities change on the event of the beneficiary's incapacity.

This section (A.C.A. § 28-72-410) is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appointment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

This section (A.C.A. § 28-72-410) also does not provide a proceeding to attack the legal competence of a transferor in setting up a trust under Section 2 (A.C.A. § 28-72-402). Rather, Section 10 (A.C.A. § 28-72-410) relates to a management matter in a validly established custodial trust.

Subsection (f) (A.C.A. § 28-72-410(f)) provides that the incapacity of the beneficiary does not terminate the custodial trust. If the beneficiary becomes incapacitated, the authority of the custodial trustee continues and the custodial trustee must follow the statutory provisions of the Act (A.C.A. § 28-72-401 et seq.) relating to managing custodial trusts for incapacitated individuals.

Comment to § 11 (A.C.A. § 28-72-411)

This section (A.C.A. § 28-72-411) is based upon Section 16 of the UTMA (A.C.A. § 9-26-216) and protects third

persons who deal in good faith with the custodial trustee.

Comment to § 12 (A.C.A. § 28-72-412)

This section (A.C.A. § 28-72-412) is patterned after Section 17 of the UTMA (A.C.A. § 9-26-217) and that section in turn was based upon Sections 5-428 and 7-306 of the Uniform Probate Code limiting the liability of conservators and trustees. See also Restatement of Trusts, 2d, Sections 265 and 277. The effect of this section (A.C.A. § 28-72-412) is to limit the claims of third parties to recourse against custodial trust property as both the custodial trustee and the beneficiary are protected from personal liability absent per-

sonal fault on their part. This section (A.C.A. § 28-72-412) does not alter the obligations between the custodial trustee and the beneficiary arising out of the administration of the estate and the accounting for that administration.

There may be cases in which a custodial trustee or beneficiary may have a right to possession of custodial trust property and may insure against liability arising out of possession or control of the property as a named insured, e.g., under homeowner's or automobile liability insurance. In such

a case, the beneficiary should be permitted as a party defendant under subsection (d) (A.C.A. § 28-72-412(d)) but only to the

extent of the protection of the liability insurance.

Comment to § 13 (A.C.A. § 28-72-413)

This section (A.C.A. § 28-72-413) follows many of the provisions of Section 18 of UTMA (A.C.A. § 9-26-218) with some substantive changes. It is designed to accommodate in a single section the circumstances in which a custodial trustee would be replaced by another custodial trustee. Under subsection (b) (A.C.A. § 28-72-413(b)), if the beneficiary is incapacitated, a custodial trustee who resigns must give written notice to both the beneficiary and the beneficiary's conservator if one exists. Under subsection (c) (A.C.A. § 28-72-413(c)), a beneficiary who is not incapacitated may designate, without limitation, a successor custodial trustee. If, however, the beneficiary fails to act or is incapacitated, the procedure to be followed is very similar to that found in UTMA (A.C.A. § 9-26-201 et seq.) except that the

nonincapacitated beneficiary has 90 days to act and if the beneficiary has no conservator or if the conservator declines to act, the custodial trustee may eventually designate a successor custodial trustee.

Under subsection (f) (A.C.A. § 28-72-413(f)), the beneficiary, whether or not incapacitated, can petition the court to remove the custodial trustee for cause and to designate a successor trustee, or the court may require the custodial trustee to give bond or other appropriate relief.

This section (A.C.A. § 28-72-413), unlike Section 18 of UTMA (A.C.A. § 9-26-218), does not give the custodial trustee the general power to designate a successor custodial trustee but rather limits that power to the situation in which the procedure for designating successor custodial trustees by others has been exhausted.

Comment to § 14 (A.C.A. § 28-72-414)

This section (A.C.A. § 28-72-414) follows the pattern of Section 15 of the UTMA (A.C.A. § 9-26-215) except it does subject the arrangements for payment of expenses, compensation, and bond to provisions in the custodial trust instrument or agreement of the beneficiary or court order.

As in UTMA (A.C.A. § 9-26-201 et seq.), the provisions with regard to compensation are designed to avoid imputed com-

pensation to the custodian who waives compensation and also to avoid the accumulation of claims for compensation until the termination of the custodial trust. Although the ability to control these matters by the trust instrument or agreement of the beneficiary seems to be implied, as was assumed in UTMA (A.C.A. § 9-26-201 et seq.), it is here expressly stated because of the possibility of informal arrangements with persons as trustees.

Comment to § 15 (A.C.A. § 28-72-415)

This section (A.C.A. § 28-72-415) requires that the custodial trustee inform the beneficiary of the initiation of the trust and provide reasonably current reports of the administration of the custodial trust to the beneficiary or the beneficiary's legal representative. Even though some custodial trustees may act informally, it seems appropriate that both the trustee and the beneficiary be expected to exchange complete information concerning the administration of the trust at least once each year. In some cases, more frequent exchanges of information between

the custodial trustee and beneficiary would be expected, e.g., when they use a bank account to which both have access. This is particularly true with regard to necessary information for tax reporting by the parties involved. This section (A.C.A. § 28-72-415) assumes the usual minimum components of an account, i.e., assets and values at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or available for distribution at the close of the accounting period.

Subsection (a) (A.C.A. § 28-72-415(a)) identifies the necessary reports and accountings for the parties, and subsection (b) (A.C.A. § 28-72-415(b)) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section (A.C.A. § 28-72-415) is drawn from Sec-

tion 19 of the UTMA (A.C.A. § 9-26-219) modified to fit the custodial trust. Subsection (f) (A.C.A. § 28-72-415(f)) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph (A.C.A. § 28-72-415(f)) is patterned after Uniform Probate Code Section 7-205.

Comment to § 16 (A.C.A. § 28-72-416)

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section (A.C.A. § 28-72-416). The limitations provided in this section (A.C.A. § 28-72-416) are derived from the Uniform Probate Code, Sections 1-106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section (A.C.A. § 28-72-416) are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as required under Section 13 (A.C.A. § 28-72-413) on removal or resignation, or the deceased custodial trustee's personal representative accounts, the

two-year limitation of subsection (a)(1) (A.C.A. § 28-72-416(a)(1)) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (a)(2) (A.C.A. § 28-72-416(a)(2)) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (b) (A.C.A. § 28-72-416(b)) would apply. In any event, should the beneficiary become incapacitated or die before the applicable time limitation had expired, the tolling provision of subsection (c) (A.C.A. § 28-72-416(c)) could postpone the time bar until two years after removal of the disability or death.

Comment to § 17 (A.C.A. § 28-72-417)

This section (A.C.A. § 28-72-417) controls distribution of the custodial trust property when the custodial trust is terminated under Section 2(e) (A.C.A. § 28-72-402(e)). It is designed to provide for efficient and certain distribution without judicial proceedings. Subsection (a)(3) (A.C.A. § 28-72-417(a)(3)) is an important provision for avoiding complications on distribution and provides that distribution may be controlled first, by the direction of the deceased beneficiary or second, by the custodial trust instrument (see Sections 2, 6 and 18) (A.C.A. §§ 28-72-402, 28-72-406, and 28-72-418) and, only if no effective prior designation for the payment or distribution of the property on the death of the beneficiary has been made, shall it pass through the beneficiary's estate.

The direction to the custodial trustee by the beneficiary, who is not incapacitated,

for distribution on termination of the custodial trust may be in any written form clearly identifying the distributee. For example, the following direction would be adequate under the statute:

I, _____ (name of beneficiary) hereby direct _____ (name of trustee) as custodial trustee, to transfer and pay the unexpended balance of the custodial trust property of which I am beneficiary to _____ as distributee on the termination of the trust at my death. In the event of the prior death of _____ above named as distributee, I designate _____ as distributee of the custodial trust property.

Receipt Acknowledged	Signed
(signature)	(signature)
_____	_____
Custodial Trustee	Beneficiary
Date _____	Date _____

Comment to § 18 (A.C.A. § 28-72-418)

This section (A.C.A. § 28-72-418) largely follows Section 9 of UTMA (A.C.A. § 9-26-209). It provides instructional detail for forms and methods of transferring assets that satisfy the requirements of the statute. Although many of the customary methods of transferring assets are identified, these methods are not intended to be exclusive since any type of property that can be transferred by any legal means is intended to be within the scope of the statute, provided the requirements of Sec-

tion 2 (A.C.A. § 28-72-402) are met. The method of transfer or conveyance appropriate to the asset should be used, e.g, if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute (A.C.A. § 28-72-401 et seq.) as self-contained and as fully explanatory as possible these provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

Comment to § 19 (A.C.A. § 28-72-419)

This section (A.C.A. § 28-72-419) is designed to avoid confusion in the event a

party or assets are removed from the state.



